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NOTES OF INDIAN CASES.

GOKUL CHANDRA DAS *v.* MANAGER, BENIACHANG MAJUMDARI WARD ESTATE, I.L.R. (1940) 1 Cal. 73.

The question considered in this case is whether a manager appointed by the Court of Wards of a ward's estate is a "public officer" within the meaning of S. 2 (17) of the Civil Procedure Code, and consequently whether a notice of suit should be given to him prior to the institution of a suit. The point arose under the Bengal Court of Wards Act (Bengal Act IX of 1879). The learned Judge has held dissenting from a previous decision of the same High Court in *Nanda Lal Bose* v. *Ashutosh Ghose*[1], that the manager of an estate under the Court of Wards is a "public officer" and that notice to him under S. 80 of the Civil Procedure Code, was a pre-requisite to the suit.

In coming to this conclusion the learned Judge has held that the manager is not a public officer within the meaning of S. 2 (17-g) of the Code and that he is not also an officer in the pay of the Government within the terms of S. 2 (17-h), but that he is an officer in the service of the Government under S. 2 (17-h), that therefore he is a "public officer" within the definition and that consequently two months' notice of suit to him is required under S. 80 of the Code.

It must be observed in this connection that a Collector acting as an agent of the Court of Wards is a public officer when he acts on behalf of the Court of Wards because it is by virtue of his office as Collector, he is under the Court of Wards Act functioning for the Court of Wards. See *The Collector of Bijnor, Manager of the Estate of Chaudhri Ranjit Singh* v. *Munuvar*[2]. It has been pointed out in that case that if the Collector had been appointed as a manager specifically, he would only be a private individual and he could not be acting in his official capacity as a manager under the Court of Wards. *See* Per Straight, J., at pp. 23 and 24 and Pearson, J., at p. 22 of *The Collector of Bijnor, Manager of the Estate of Chaudhri Ranjit Singh* v. *Munuvar*.[2] If this view is correct, when a private person who is not a Collector

1. A.I.R. 1920 Cal. 167: 55 I.C. 515. 2. (1880) I.L.R. 3 All. 20 (F.B.).

has been appointed as a manager under the Court of Wards, it will not make any difference and he will not be a public officer and no notice will be required to him under S. 80 of the Code.

In this respect, the provisions of the Court of Wards Act of the other provinces are of some interest. The general lines of the other Court of Wards Acts are similar to those of the Bengal Act. S. 5 of the Madras Act enacts that the Board of Revenue should be the Court of Wards as does the Bengal Act by its 5th section. There is also provision in the Acts for the appointment of managers for the estates of disqualified proprietors. The powers and duties of such managers are also given in similar terms. There is, however, S. 30 of the Madras Court of Wards Act by which it is provided that every guardian, manager or other servant of the Court of Wards shall be deemed to be a "public servant" within the meaning of Ss. 161, 162, 163, 164 and 165 of the Indian Penal Code, and under the definition of legal remuneration contained in the said S. 161 the word "Government" shall for the purpose of this section be deemed to include the Court of Wards. There are similar provisions in the Court of Wards Acts of Bombay, the United Provinces and the Punjab. *See* S. 21 (2) of the Bombay Court of Wards Act of 1905, S. 33 of the United Provinces Court of Wards Act of 1912 and S. 42 of the Punjab Court of Wards Act of 1903. There is however no corresponding provision in the Bengal Court of Wards Act. It must be taken that the Madras, Bombay and the United Provinces Legislatures in enacting those sections must have done so in the view that the manager under the Court of Wards is not a public servant but for those provisions and that in other respects and for other purposes he is not a public servant. It is a well-known rule of statutory construction that when a thing is to be "deemed" something else, it is to be treated as that something else with the attendant consequences, but it is not that something else. *See* Per Cave, J., in *R.* v. *Norfolk, C. C.*[1]. See also *Green* v. *Marsh*[2]. It must be noticed that the definition of public servant in S. 21, cl. (9) of the Indian Penal Code, has words similar to S. 2 (17-h) of the Civil Procedure Code, that is "Every officer in the service. . . . . of Government", words which are relied upon by the learned Judge in this case for holding that the manager under the Court of Wards is a "public servant". If notwithstanding these words a manager under the Court of Wards Acts of Madras and other provinces is not a public servant under the Indian Penal Code, and a special section has to be introduced to constitute him as a public servant for certain purposes, it is open to the argument that without a

1. 60 L.J.Q.B. 380. 2. (1892) 2 Q.B. 330.

similar section in the Bengal Court of Wards Act, the manager under the Court of Wards would not be a "public servant" within the meaning of the Indian Penal Code, S. 21, cl. (9) or a "public officer" under S. 2 (17-h) of the Civil Procedure Code, and that the decision in *Nanda Lal Bose* v. *Ashutosh Ghose*[1], lays down the correct law on the point.

ABU SHAHID *v.* ABDUL HOQUE DOBHASH, I.L.R. (1940) 1 Cal. 110.

This decision brings out clearly the limits of the right to account between tenants in common. At common law, if one tenant in common occupied and took the whole profits, the other had no remedy against him whilst the tenancy in common continued unless he was put out of possession, when he might have his ejectment or, unless he appointed the other to be his bailiff as to his undivided moiety, and the other accepted the appointment, when an action of account would lie, as against the bailiff of the owner of the estate. This state of law continued until St. 4, Anne., Ch. 16 which by S. 27 provided that an action of account might be brought and maintained by a joint tenant or a tenant in common, his executors and administrators against the other for receiving more than comes to his just share or proportion, and against the executor and administrator of such joint tenant or tenant in common. By the effect of decisions, this section was restricted in its operation only to cases where the co-tenant received from a third person more than his just share of profits and it was understood not to extend to cases where the tenant in common was actually in occupation. In the latter case, that is, in the case where a co-tenant was in actual occupation, it was held by Baron Parke in *Henderson* v. *Eason*[2], that the other co-tenant had no right to account as it may be that the tenant in occupation may raise valuable crops by employing his capital and industry for which the other co-tenant did not contribute anything and it may also be that the tenant in possession may sustain a serious loss for which the other co-tenant may not be liable to contribute to any extent. Courts of Equity followed the provisions of the statute as they considered the rule of common law as inadequate to afford justice.

In India where there are no special rules of law on the subject, as in such a case, the rule of English law has been applied as being rules of equity and good conscience. See *Waghela Rajsanji* v. *Shekh Masludin*[3] and *Muhammad Raza* v. *Abbas Bandi Bibi*[4]. In this particular case, the rule of English common law as modified

1. A.I.R. 1920 Cal. 167: 55 I.C. 515 2. (1851) 17 Q.B. 701: 117 E.R. 1451.
3. (1887) L.R. 14 I.A. 89: I.L.R. 11 Bom. 551 (P.C.).
4. (1932) 63 M.L.J. 180: 7 Luck. 257 (P.C.).

by the statute of Queen Anne and adopted by the Equity Courts has been accepted as the law, in the case under notice. The learned Judges have not clearly indicated whether they would extend the rule of accountability even to cases where the other co-tenant is in actual possession.

The next point dealt with in the case is the question of the proper article of limitation applicable to a suit for account against a tenant in common who had realised more than his share of the income from the common property. At one time it was held by the Indian Courts that the action to recover the excess collected by the other co-tenant was in the nature of one for money had and received for the plaintiff's use. Among the decisions which held to this effect were *Tellis* v. *Saldanha*[1], *Vaidyanatha Aiyar* v. *Aiyaswamy Aiyar*[2], *Ramalagu Servai* v. *Solai Servai*[3], *Avancha Lakshminarasamma* v. *Avancha Lakshamma*[4], *Binode Lal* v. *Preo Nath*[5], *Segu Chidambaramma* v. *Segu Balayya*[6]. See also *Banoo Tewary* v. *Doonoo Tewary*[7], *Mahomed Wahib* v. *Mahomed Ameer*[8], *Kundun Lal* v. *Bansi Dhar*[9], *Masih-uddin* v. *Imtiaz-un-nissa*[10], *Thakur Prasad* v. *Partab*[11], *Amina Bibi* v. *Najm-un-nissa Bibi*[12] and *Abdul Ghaffar* v. *Nur Jahan Begam*[13]. The learned Judges in these cases did not realise that there could be no action for money had and received between tenants in common. This was pointed out as early as 1850 by Baron Parke in *Thomas* v. *Thomas*[14]. These decisions came up for review before a Full Bench of five Judges of the Madras High Court in *Yerukola* v. *Yerukola*[15], where they laid down that no action for money had and received would lie between tenants in common and that therefore Art. 62 of the Limitation Act could not apply to a suit for account between tenants in common and that the proper article would be only 120 of the Limitation Act and that time would begin to run only when the account was demanded and refused. Where however a co-tenant acts as the agent of the other co-tenants, the suit for account would be governed by the special Art. 89 of the Limitation Act. The learned Judges in the case under notice have taken this view of the Madras Full Bench differing from the prior decision of the Calcutta High Court in *Banoo Tewary* v. *Doonoo Tewary*[7], which had been previously doubted by the Bombay High Court in *Gabu* v. *Zipru*[16].

1. (1887) I.L.R. 10 Mad. 69.
2. (1909) 19 M.L.J. 94: I.L.R. 32 Mad. 191.
3. (1921) 41 M.L.J. 274.
4. (1913) 25 M.L.J. 531.
5. (1917) 40 I.C. 173.
6. (1911) 2 M.W.N. 467.
7. (1897) I.L.R. 24 Cal. 309.
8. (1905) I.L.R. 32 Cal. 527.
9. (1880) I.L.R. 3 All. 170.
10. (1915) I.L.R. 37 All. 40.
11. (1884) I.L.R. 6 All. 442.
12. (1915) I.L.R. 37 All. 233.
13. (1915) I.L.R. 37 All. 434.
14. (1850) 5 Exch. 28.
15. (1922) 42 M.L.J. 507 : I.L.R. 45 Mad. 648.
16. (1921) I.L.R. 45 Bom. 313.

SAIT SOGMULL LACHIRAM FIRM *v.* PARANDHAMAYYA, (1940) 2 M.L.J. 17.

S. 78 of the Provincial Insolvency Act has prescribed that the period between adjudication and annulment may be excluded in computing limitation for any suit or execution application which might have been brought but for the adjudication order, provided that the debt had been *proved* under the Act. S. 33 indicates that the proof should have been tendered *after* adjudication and S. 49 mentions the mode of such proof as the delivering or sending by post in a registered letter to the Court an affidavit verifying the debt. In England it has been held that admission of the debt by the insolvent will not be such proof, Ex parte *Revell*[1]. Even where the debt had ripened into a judgment before adjudication, the trustee in bankruptcy can challenge the reality of the consideration for the debt, Ex parte *Lennox*[2], Ex parte *Kibble*[3] and In re *Van Laun*: Ex parte *Pattullo*[4]. The same principles have been applied in India in a number of cases—see *Fazal Azim* v. *Tulsi Ram*[5], Re *an Advocate*[6], *Ram Lal Tandon* v. *Kashi Charan*[7] and *Sriput Singh* v. *Ram Sarup*[8], etc.

It has however been held that S. 49 is not exhaustive of the modes of proving a debt, *Fazal Azim* v. *Tulsi Ram*[5] and that it does not lay down any mode of proof that is mandatory, *Bhudermull* v. *Haji Mahomed*[9]. In fact S. 49 uses the word *may* and not *shall* as regards the mode of proof indicated there. In Madras, it has been held that obtaining a judgment on the debt subsequent to adjudication in proceedings to which the Official Receiver is a party is good proof though it is not the mode of proof specified in S. 49, *Ramalinga Aiyar Firm* v. *Rayalu Aiyar*[10]. Excepting for this, in all other cases, the Madras High Court has held that proof of debt for purposes of S. 78 should be in the mode set out in S. 49 and if proof has been lodged in conformity with that section it will suffice even if it has not been actually admitted by the Official Receiver, *Lakshmi Bai* v. *Rukmaji Rao*[11] and *Veerayya* v.

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1. 54 L.J.Q.B. 92.
2. (1885) 16 Q.B D. 315.
3. (1875) 10 Ch. App 373, 377.
4. (1907) 1 K.B. 155, 162.
5. (1937) 171 I.C. 609: 1937 O.W.N. 1143.
6. (1931) 61 M.L.J. 229: I.L.R. 54 Mad. 601 (F.B.).
7. A.I.R. 1928 All. 380: 28 A.L.J. 241.
8. A.I.R. 1926 Cal. 982: 95 I.C. 463.
9. A.I.R. 1938 Pat. 65: 173 I.C. 988.
10. (1929) 58 M.L.J. 170: I.L.R. 53 Mad. 243.
11. (1934) 67 M.L.J. 45: I.L.R. 57 Mad. 767.

Narasimha Rao[1]. If the creditor has done all that he should do and there has been no refusal by the Official Receiver, the benefit of S. 78 will be available, *Rali Ram* v. *Sant Ram*[2]. In that view it has been held that mere admission of the debt by the insolvent in the course of the insolvency proceedings will not amount to the tender of proof under the Act, for purposes of S. 78, *Mannasao Kalesar Bani* v. *Rambharosa*[3], *Veerayya* v. *Narasimha Rao*[1] and *Fazal Azim* v. *Tulsi Ram*[4]. In the present case the Madras High Court has reaffirmed that view and held that a debt can be held proved only if proof has been given of the kind which will enable a creditor to qualify for obtaining dividend—a proof to which objection could be taken by the Official Receiver or any of the creditors, that is, proof as laid down in S. 49. The Calcutta High Court has taken a different view in *Krishna Chandra Das* v. *Jatindra Nath Porial*[5] and held that S. 49 has merely specified a simple but by no means the only mode of tendering proof and that proof of debt in the course of proceedings leading to or preceding adjudication will be sufficient proof for purposes of S. 78 also. The Calcutta view overlooks the words in the proviso to S. 78 that the proof should be "under this Act", and that proof under the Act is specified in S. 49 only. It is also opposed to the very object of the proviso and fails to note that proof for purposes of Ss. 11 and 24 is directed to the making out of the debtor's insolvency and has no other object to serve.

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1. (1937) 2 M.L.J. 883.
2. A.I.R. 1933 Lah. 101 : 142 I.C. 644.
3. A.I.R. 1934 Nag. 282 : 153 I.C. 533.
4. (1937) 171 I.C. 609 : 1937 O.W.N. 1143.
5. A.I.R. 1929 Cal. 159 : 48 C.L.J. 574 : 114 I.C. 415.

SECRETARY OF STATE FOR INDIA IN COUNCIL *v.* HUSSAIN SAHEB, (1940) 2 M.L.J. 13.

This decision holds that at any rate with regard to a first grant, patta is given to the person to whom the Government has granted the land, that though a patta is not a title deed it is yet a document of title, and that on cancellation of a tree patta there is a resumption of its rights by the Government. If the suggestion be that as regards lands, cultivated as well as waste, the ryot always came into existence under a letting by the sovereign and that the latter is the owner of all lands, the conclusion is certainly debatable. It is opposed to the view in *Venkatanarasimha* v. *Dandamudi Kotayya*[1], *Lekkamani* v. *Puchaya*[2] and other cases. It also runs counter to the Hindu as well as the Mahomedan theories regarding the origin of property in land.

As to the evidentiary value of a patta, though it had been suggested in cases like *Freeman* v. *Fairlie*[3], *Mangamma* v. *Timmapaiah*[4] and *Subramaniam Chetty* v. *Mahalingaswami Sivan*[5], that it is not evidence of title but of possession only, it has now been recognised that the probative value of a patta varies according as the dispute is between the Government and a ryot or as between two rival ryots, and that in certain cases it will afford evidence of title also, *Donganna* v. *Jammanna*[6]. In *Gopal Chettiar* v. *Arasappa Pillai*[7], it has been held that a patta granted by a landholder to a ryot under the Madras Estates Land Act is strong *prima facie* evidence of title so as to entitle a transferee from the pattadar to claim the protection of S. 41 of the T. P. Act. In fact it may be sufficient evidence of title to create an equitable mortgage of property, *Official Assignee* v. *Badri Narain*[8].

As to the effect of cancellation of a tree patta it had been held in *Sengoda Goundan* v. *Varadappan*[9], that it merely puts an end to the revenue demand in respect of the trees and does not *ipso facto* operate as a resumption of its rights by the Government. That where the land pattadar and the tree pattadar were different persons, refusal to issue fresh tree pattas will not extinguish the tree pattadar's rights was the view of Ramesam, J., in *Chinnappa*

1. (1897) 7 M.L.J. 251: I.L.R. 20 Mad. 299.
2. (1870) 6 M.H.C.R. 208.
3. 1 Moo.I.A. 305.
4. (1866) 3 M.H.C.R. 134.
5. (1909) 19 M.L.J. 627: I.L.R. 33 Mad. 41 (F.B.).
6. A.I.R. 1931 Mad. 613: 133 I.C. 782.
7. (1940) M.W.N. 190: 51 L.W. 351: A.I.R. 1940 Mad. 523; see also *Srinath Ray* v. *Maharaj Pratap*, (1923) M.W.N. 702: 28 C.W.N. 145 (P.C.).
8. (1924) 48 M.L.J. 423: I.L.R. 48 Mad. 454.
9. (1911) 22 M.L.J. 201: I.L.R. 36 Mad. 148.

Naidu v. *Raju Goundan*[1]. The present decision seems to mark a departure from the earlier view and suggests that cancellation of the tree patta would place the trees at the disposal of the Government.

RAM SARUP SINGH *v.* MOHAN SINGH, I.L.R. (1939) All. 713.

One of the points that fell to be decided in this case was whether the property acquired by a widow by adverse possession would be her stridhana. Commenting on Yagnavalkya's text (II, 143) the Mithakshara has declared that property obtained by seizure would be regarded as stridhana. Apararka has also taken the same view of the text[2]. That a widow can prescribe for an absolute estate is now indisputable: see *Satgur Prasad* v. *Kishore Lal*[3] and *Varada Pillai* v. *Jeevarathnammal*[4]. As early as 1894, the Privy Council laid down in *Lachhan Kunwar* v. *Manorath Ram*[5] that "unless it was clearly shown that when the widow took possession she professed to do it as claiming only the limited estate of the widow," she should be held to take an absolute estate. In *Lajawanti* v. *Safa Chand*[6], however, the Privy Council declared that "if possessing as widow she possesses adversely to any one as to certain parcels, she does not acquire the parcels as stridhan, but she makes them good to her husband's estate."

The two observations were held to be not inconsistent and that it is a question of fact in each case whether the widow claimed to take through her husband and so limited her claim to a claim for a widow's estate or whether there is no evidence that she so limited her claim, in which case she will take an absolute estate, see *Dungar Singh* v. *Mt. Maid Kunwar*[7]. A mere recital that she had acquired the property as heir to the husband does not necessarily involve the legal inference that she was asserting only a limited right, particularly where there were other pieces of evidence to indicate that she had claimed absolute rights on other occasions, see *Sham Koer* v. *Dah Koer*[8] and *Uma Shankar* v. *Aisha Khatun*[9].

In the present case, on her husband's death, a widow took possession of his properties as well as of certain other properties which did not belong to him and of which he was never in posses-

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1. (1927) 53 M.L.J. 104.
2. (1911) 21 M.L.J. (Jour.) 428.
3. (1920) 38 M.L.J. 259: L.R. 46 I.A. 197: I.L.R. 42 All. 152 (P.C.).
4. (1920) 38 M.L.J. 313: L.R. 46 I.A. 285: I.L.R. 43 Mad. 244 (P.C.).
5. (1894) 5 M.L.J. 1: L.R. 22 I.A. 25: I.L.R. 22 Cal. 445 (P.C.).
6. (1924) 47 M.L.J. 935: L.R. 51 I.A. 171: I.L.R. 5 Lah. 192 (P.C.).
7. A.I.R. 1933 All. 823.
8. (1902) L.R. 29 I.A. 132: I.L.R. 29 Cal. 664 (P.C.).
9. (1923) I.L.R. 45 All. 729.

sion. The High Court took the view that the crucial factor in determining the character of these other properties was the animus of the widow at the time of taking possession and that the burden of proof will lie on the person challenging the stridhana character of the acquisition to prove the contrary. Though seemingly the decision suggests the existence of a presumption in favour of a widow's acquisition by adverse possession being regarded as stridhana, the conclusion is really one resting on the facts of the case.

RUPCHAND *v.* GURDIAL, I.L.R. (1939) All. 162.

This case decides an important question of procedural law involving the interpretation of the relative scope of Ss. 63 and 73 of the Civil Procedure Code. The point was whether holders of decrees of inferior courts whereof execution has been stopped by the operation of S. 63 are entitled to apply to the superior court for rateable distribution under that section read with S. 73, without getting a transfer of their decrees to the latter court for purposes of execution. In the present case the plaintiff had obtained a decree against the judgment-debtor in the Munsif's Court and attached his property in execution. Subsequently the first defendant who had obtained a decree against the judgment-debtor in the Sub-Court took out execution and had the self-same property sold by the Sub-Court. The plaintiff applied to the Sub-Court for rateable distribution, but the claim was rejected. Thereupon he filed a regular suit for the vindication of his claim to such distribution.

Three different views are gatherable fron the decided cases. According to one view, unless the holder of the decree of the inferior Court gets it transferred to the Court realising the property for purposes of execution and complies with S. 73 he cannot claim rateable distribution—see *Muttalagiri* v. *Muttayyar*[1], *Nimbaji Tulsiram* v. *Vadia Venkati*[2], *Ramjus Agarwala* v. *Guru Charan Sen*[3] and *Narasayya* v. *Obbayya*[4]. A second view was that where the attachment of the inferior Court was prior in point of time to that of the superior Court realising the property no application to the latter Court will be necessary to entitle the decree-holder, attaching earlier, to rateable distribution; otherwise a regular application under S. 73 to the latter Court will be needed, see *Krishna Kumar Ghosh* v. *Pasupati Banerjee*[5]. The third and the last view was, that S. 73 does not postulate any self-contained rule regarding rateable distribution, that that section should be read with S. 63 which forms an exception to it, and that the Court realising the assets can grant rateable distribution under the latter

1. (1883) I.L.R. 6 Mad. 357.
2. (1892) I.L.R. 16 Bom. 683.
3. (1910) 14 C.W.N. 396.
4. (1913) 25 M.L.J. 601.
5. A.I.R. 1921 Cal. 87.

section to the holder of the decree of the inferior Court, though that decree has not been transferred to the superior Court and no execution proceedings have been initiated there. (See *Clark* v. *Alexander*[1], *Arimuthu* v. *Vyapuri*[2], *Narasimhacharigr* v. *Krishnamachariar*[3], *Girindra Nath Ray* v. *Kedar Nath*[4], *Kwai Tong Kee* v. *Lim Chaung Ghee*[5], *S. R. A. R. M. Firm* v. *A. L. S. P. P. L. Firm*[6], *Sarju Ram Sahu* v. *Partap Narain*[7], *Gourgopal De Sarkar* v. *Kamalkalika Datta*[8], *Thanmull* v. *Krishnaswami*[9], *Dhirendrarao Krishnarao* v. *Virbhadrappa*[10], *Iswardas* v. *Corporation of Madras*[11], *Surendra Kumar Guha* v. *Jaimini Kumar Guha*[12] and *Zumberlal Chhotelal* v. *Sitaram*[13].)

It is clear that the question concerns more a matter of procedure than of substantive right. It is equally clear that uniformity should above all be desired in the matter. Considerations of justice and convenience should therefore guide the interpretation of Ss. 63 and 73. To construe them so as to render nugatory the attachment obtained by the decree-holder in the inferior Court will certainly cause unnecessary hardship. The view favoured in *Ramjus Agarwala's case*[14] and like decisions was based partly on the fact that the words "shall determine any claim" in S. 285 of the old Civil Procedure Code, must refer to the claims referred to in Ss. 278 to 281. Those sections no longer precede S. 63 of the Code of 1908 but are now reproduced in O. 21, rr. 58 to 61. The chief basis of that view has thus disappeared. Again whereas under S. 295 of the earlier Code, application for rateable distribution had to be made to the Court which realised the assets, under the present S. 73 it is not clear that such application should be made only to the Court which held the assets. As pointed out in *Narasimhachari's case*[3], the receipt of assets by the collecting Court is really a receipt on behalf of all the Courts who have attached the same property of the judgment-debtor and hence the attaching decree-holders in each of the Courts should be held entitled to rateable distribution in the assets in the actual custody of the collecting Court. It is to be noted that at any rate all the later decisions of all the High Courts have recognised the soundness of this view and the present decision of the Allahabad High Court adopts the same conclusion.

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1. (1894) I.L.R. 21 Cal. 200.
2. (1912) 21 M.L.J. 505: I.L.R. 35 Mad. 588.
3. (1914) 26 M.L.J. 406.
4. A.I.R. 1925 Cal. 966.
5. (1928) I.L.R. 6 Rang. 131.
6. A.I.R. 1931 Rang. 111.
7. (1933) I.L.R. 55 All. 622.
8. (1934) I.L.R. 61 Cal. 240.
9. A.I.R. 1935 Mad. 988.
10. (1935) I.L.R. 59 Bom. 310.
11. (1936) 71 M.L.J. 328: I.L.R. 59 Mad. 1028.
12. I.L.R. (1937) 1 Cal. 391.
13. I.L.R. (1937) Nag. 219.
14. (1910) 14 C.W.N. 396.

FIRM LADURAM SAGARMAL *v.* JAMUNA PRASAD CHAUDHURI, I.L.R. (1939) Pat. 114.

The Indian Partnership Act does not in terms make the registration of firms compulsory. Still the effect of the prohibitions specified in S. 69 will practically necessitate the registration of a firm at some time or other. S. 69 (2) lays down that no suit can be instituted by an unregistered firm against any third party to enforce a right arising from a contract. Judicial opinion is conflicting whether non-registration is fatal to the very institution of the suit or merely precludes relief being given and whether registration subsequent to institution can relate back to the filing of the plaint or at least enable the plaint to be amended and treated as presented immediately after such registration. The Calcutta High Court has favoured the construction of the section in "accordance with justice," rather than with the strict letter of it, and held that a suit filed by an unregistered firm may be deemed to have been instituted on the day following the registration, if there has been such subsequent registration, *Radha Charan Saha* v. *Matilal Saha*[1]. According to that Court the section does not deprive the Court of its jurisdiction but merely keeps it suspended pending registration. The same view has been taken in *Varadarajulu Naidu* v. *Rajamanicka Mudaliar*[2], though it is recognised that a logical construction of the section may lead to a different result. Where under O. 33, r. 15, C.P. Code, a person whose application to sue in *forma pauperis* has been refused, has been given liberty to institute a suit in the ordinary manner provided he has *first* paid the costs awarded to the Government and the opposite party in his application to sue as a pauper and he institutes such a suit without satisfying the condition but pays the costs later on it has been held that the suit need not be dismissed but may be treated as instituted on the day the condition was satisfied, *Ramakrishna Nadar* v. *Thirumalai Vandaya Thevan*[3]. By parity of reasoning, the registration of a firm subsequent to the institution of a suit by it, may be regarded as having the same effect. A strict construction of the section has however been adopted by the Allahabad and Lahore High Courts, and suits instituted by unregistered firms have been held to be altogether incompetent and incapable of being regularised by subsequent registration, *Ram Prasad* v. *Kampta Prasad*[4], *Firm Kishen Lal* v. *Abdul Ghafur Khan*[5], *Chhagan Lal* v. *Firm Mangal Sain*[6]; see also *Subramania Mudaliar* v. *East Asiatic Company*[7].

The present case follows this view in preference to that adopted in Calcutta and in the later decision of the Madras High Court. There

1. (1937) 41 C.W.N. 534.
2. (1937) 2 M.L.J. 273.
3. (1935) 69 M.L.J. 791.
4. A.I.R. 1935 All. 898.
5. (1935) I.L.R. 17 Lah. 275.
6. A.I.R. 1938 Lah. 767.
7. (1936) 71 M.L.J. 663.

is no real analogy between a plaint presented by an unregistered firm and one filed prematurely when the cause of action had not yet arisen. Registration of firms is after all designed primarily to protect third parties. There can be no frustration of this object or of any policy of the law, in any degree, by construing S. 69 (2) liberally, as enabling a suit brought before registration of the firm to be regarded as validly instituted immediately after registration, where that has been done, instead of being liable to be dismissed outright. The policy underlying O. 26, r. 4 of the Supreme Court Rules may well be followed in India as well. Again as pointed out in *Mt. Suga Kuer* v. *Firm Brijraj*[1], the Partnership Act has not been in force for any long period and it would be inappropriate to enforce the provisions too rigidly.

SITAL PRASAD SINGH *v.* AJABLAL MANDER, I.L.R. (1939) Pat. 306.

The main point for decision in this case related to the power of a manager of a joint Hindu family to mortgage ancestral property to find funds for the acquisition of new properties for the family. After deprecating any alienation of immovable property in general the Mitakshara postulates in Ch. I, S. 1, cl. 28, an exception, on the authority of a text of Brihaspati :

एकोऽपि स्थावरे कुर्याद् दानाधमनविक्रयम् ।
आपत्काले कुटुंबार्थे धर्मार्थे च विशेषत: ॥

Even one person may conclude a gift, hypothecation or sale of immovable property during a calamity or for the sake of the family or for indispensable religious duties. The exposition of the text in cl. 29 by the Mitakshara makes it clear that the three circumstances specified therein should pertain to the entire family. The Privy Council has recognised in *Benares Bank* v. *Hari Narayan*[2], that this exposition defines the power of a joint family manager to alienate family property, and that the judgment of the Board in *Hanuman Prasad's case*[3] was apparently founded on that authority. Need or benefit of the estate will alone justify an alienation. These expressions correspond evidently to आपत्काले and कुटुंबार्थे in Brihaspati's text. It is clear that the two phrases refer to two different situations. Nevertheless there are to be found dicta of the Privy Council, which suggest that alienation of joint family property will be justified only if there is a compelling necessity, see *Brij Narain* v. *Mangal Prasad*[4] and *Benares Bank* v. *Hari Narayan*[2]. That such an inference will not be valid is clear from observations of the Privy Council in other cases. *Hanuman Prasad's case*[3] itself speaks of "need" *or* "benefit of the estate" as justifying an alienation and draws a distinction between "a danger

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1. A.I.R. 1937 Pat. 526.
2. (1932) I.L.R. 54 All. 564 (P.C.).
3. (1856) 6 Moo. I.A. 393.
4. (1923) I.L.R. 46 All. 95 (101) (P.C.).

to be averted from the estate" and "the benefit to be conferred upon it"; see also *Sadhu Ram* v. *Bhup Singh*[1] and *Sri Thakur Ramakrishna* v. *Ratan Chand*[2].

The meaning of the phrase "benefit of the estate" has been considered by the Privy Council in *Palaniappa* v. *Devasikamani*[3]. While recognising that a precise definition of it would be impossible, Lord Atkinson held that the preservation of the estate from extinction, the protection of it from deterioration and such *like* things would obviously be benefits. This lent colour to the view that that expression must be understood to refer to acts of a purely protective or defensive character, *Ragho* v. *Zaga*[4] and *Ramkaran Thakur* v. *Baldeo Thakur*[5]. It was in that view that a sale or mortgage of family property for the purchase of other properties for the family was considered in some cases to be bad, see In re *Krishnaswami*[6], *Subramania* v. *Chidambara*[7], *Tula Ram* v. *Tulsi Ram*[8], *Inspector Singh* v. *Kharak Singh*[9], etc. There is not much warrant for so restricting the scope of the expression "benefit of the estate." The Sanskrit equivalent कुटुम्बार्थे refers to family purpose in general and not to the protection of the family only. Even as early as *Hanuman Prasad's case*, the propriety of an alienation by a limited owner was judged by the test whether the transaction was one into which a prudent owner would enter in the ordinary course of business, with the knowledge available to him at that time; see also *Jagat Narain* v. *Mathura Prasad*[10], *Amrej Singh* v. *Shambu Singh*[11] and *Ram Nath* v. *Chiranji Lal*[12]. Applying this test and regarding it as a question of fact depending upon the circumstances of each case, it has been held in a series of decisions that an alienation of joint family property for buying other properties for the family may be permissible as an act beneficial to the family, see *Muthuswami* v. *Sundara Velan*[13], *Mahalakshmamma* v. *Ramaswami*[14], *Amrej Singh* v. *Shambu Singh*,[15] *Ram Bilas Singh* v. *Ramyad Singh*[16], *Sheikh Jan Mohammad* v. *Bikoo Mahto*[17], *Baijnath Prasad* v. *Binda Prasad*[18], etc. The decision under review takes the same view and holds that it is for the Court to consider on the facts whether the impugned transaction is for the benefit of the family, in the larger sense of that expression.

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1. (1919) I L R 39 All. 437 (P.C.).
2. (1931) I L R. 53 All. 190 (P.C.)
3. (1919) 33 M.L.J. 1: L.R. 44 I.A. 147: I.L.R. 40 Mad. 709, 718. (P.C.).
4. (1929) I.L.R. 53 Bom. 419.
5. (1938) I.L.R. 17 Pat. 168.
6. (1912) M.W.N. 167.
7. 41 M.L.J. 459.
8. (1920) I.L.R. 42 All. 559.
9. (1928) I.L.R. 50 All. 776.
10. (1928) I L R 50 All. 969 (F.B.)
11. (1933) I L R. 55 All. 1 (F.B.).
12. (1935) I.L.R. 57 All. 605.
13. (1927) 53 M L.J. 218: A.I.R. 1927 Mad. 649.
14. (1926) 50 M.L.J. 651.
15. (1933) I.L.R. 55 All. 1 (F.B.)
16. (1920) 5 Pat.L.J. 622.
17. (1928) I.L.R. 7 Pat. 798.
18. (1938) I.L.R. 17 Pat. 549.

BRIJ BEHARI LAL *v.* FIRM SRINIVAS RAM KUMAR, I.L.R. (1939) Pat. 327 (F.B.); UPENDRA NATH BASU *v.* PANDAYA GULAB SARKAR, I.L.R. (1940) Pat. 531 (F.B.).

The proviso to O. 21, r. 90, C. P. Code, framed by the Patna High Court lays down that no application under that rule shall be admitted unless the applicant deposits along with his application such an amount not exceeding 12½ per cent. of the proceeds of the sale or such other security as the Court may fix unless the Court dispenses with the deposit altogether. Two questions arose for decision on this proviso, namely, (1) whether the deposit should have been made at the time of the presentation itself of the application or may be made at any time before its admission, and (2) whether the proviso is *intra vires* the rule-making powers of the Patna High Court. On the first question, the first Full Bench held that the deposit may be made at any time before the admission of the application, a view which was accepted by the second Full Bench also. As regards the second question, the earlier Full Bench left the matter open but the later Full Bench decided that the proviso is perfectly valid.

It is difficult to agree with the construction of the proviso adopted by the Full Bench. Their Lordships have argued that the proviso draws a distinction between the *presentation* of an application and its *admission*, and that it prohibits the Court only from admitting an application before the deposit is made, but does not bar the *filing* of the application itself. In other words while the application will have to be filed within 30 days of the sale as prescribed by the Limitation Act, the deposit may be made later. Reliance is also placed for such a construction by a reference to the difference in language employed in S. 17 (1) of the Provincial Small Cause Courts Act which provides that an applicant for an order to set aside an *ex parte* decree or for a review of judgment shall at the time of its *presentation* be accompanied by a deposit in Court of the amount decreed unless the Court on a *previous application* had directed him to give security. Under this section it has been held that the deposit should be made in any event before the expiry of the period of limitation prescribed for the application, *Ahmed Haji Ibrahim* v. *Abdul Hussain*[1] and *Qabul Singh* v. *Jai Prakash*[2]. The absence of the term 'presentation' in the proviso to O. 21, r. 90 can hardly make any difference. The proviso is wholly clear that the deposit should be made "along with the application." The words "along with" can never mean "later on" or "subsequently." It cannot in any event contemplate a period beyond that prescribed for the application itself. If deposit is to be dispensed with, it should have been ordered on an earlier

1. (1932) I.L.R. 55 Bom. 779. 2. I.L.R. (1939) All. 554.

application for that purpose. The view of the Full Bench ignores altogether the requirement in the proviso that the deposit should be made *along with the application.*

As to the validity of the amendment to O. 21, r. 90, it depends mainly on the actual language of the amendment and its effect. The rule-making power of the High Court flows from S. 122 and is conditioned by S. 128, C.P. Code. The rules framed can annul, alter or add to the rules in the First Schedule. The only limitations are that they should not clash with the body of the Code or with any other enactment in force. The question thus will be whether the proviso to O. 21, r. 90 framed by the Patna High Court cuts at any substantive right or merely deals with a matter of procedure. "Procedure" merely " denotes the mode of proceeding by which a legal right is enforced as distinguished from the law which gives or defines that right." (*Poyser* v. *Minors*[1].) It is doubtful if a litigant has, apart from the provisions of the statute under which a sale is held, any common law right to avoid the sale —see however In re *O. N. R. M. M. Chettyar Firm* v. *The Central Bank of India*[2]. Even if the right to have the sale set aside is a common law right, it must be deemed to have been merged in and replaced by the statutory right conferred by O. 21, r. 90. In any event the validity of the proviso to that rule will depend upon the question, whether it imposes an indispensable preliminary before any proceedings take place at all or whether it merely seeks to put the applicant upon terms as part of the procedure in the hearing of the application. In Rangoon, the amendment to the rule laid down that no application to set aside a sale shall be admitted unless the applicant deposits with his application the amount mentioned in the sale warrant or an amount equal to that realised by the sale whichever is less. The deposit was a condition precedent. Nothing was left to the discretion of the Court in that matter. The amendment stifled altogether the right of being heard to impeach the sale and hence was rightly held to be *ultra vires.* Where the effect of the amendment is however merely to put the applicant upon terms, stringent though they might be, as part of the procedure in hearing the application, no objection can be taken to its validity. Thus on a construction of the rules framed under S. 9 of the Presidency Small Cause Courts Act requiring an applicant for a new trial either to deposit the decree amount or furnish security therefor as a condition precedent to such application, it was held that the rule failed as being repugnant to S. 38, though it would be competent to the Small Cause Court to impose such a condition when a retrial was

1. L.R 7 Q.B.D. 329 at 333. 2. (1937) Rang.L.R. 268 (F.B.)

actually ordered, *Madurai Pillai* v. *Muthu Chetty*[1]. Where a power to make regulations is given by a statute the general rule is that no regulation thereunder can abridge a right conferred by the statute itself.[1] To make an absolute rule which has the effect of debarring a man from the exercise of an absolute statutory right unless he complies with a number of requirements, is clearly *ultra vires*, per Kennedy, J. in *Queen* v. *Bird*[2]. Where on an appeal preferred under cl. 15 of the Letters Patent of the Calcutta High Court, against the rejection by that Court in its original jurisdiction of an application under the Probate and Administration Act of 1881, the High Court applied O. 41, r. 10, C. P. Code and asked the appellant to furnish security for costs, it was held by the Privy Council that such an order neither limits nor takes away the right of appeal under the Letters Patent but is only a rule of procedure applicable to Letters Patent Appeals also, *Sabitri* v. *Savi*[3]. The test therefore of the validity of any amendment to O. 21, r. 90 effected under the rule-making power will depend on the nature of the amendment and its effect. In Madras, the proviso framed states that the Court may before admitting an application under O. 21, r. 90 call upon the applicant to furnish security for the amount mentioned in the sale warrant or that realised by the sale whichever is less, or to deposit such amount into Court. There is no bar whatever to the presentation of the application, and whether a deposit is to be required or security should be called for is a matter left entirely to the discretion of the Court. There was thus no violation of any substantive right and the amendment was held to be *intra vires*[4]. The language of the proviso framed by the Patna High Court however requires the deposit to be made along with the application under O. 21, r. 90, unless it had been dispensed with. But for the rather curious construction of the proviso adopted by that High Court, namely, that the deposit may be made at any time before admission of the application the validity of the proviso would have been extremely doubtful.

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1. (1914) 26 M.L.J. 227: I.L.R. 38 Mad. 823.
2. (1898) 2 Q.B.D. 340.
3. (1921) 40 M.L.J. 308: L.R. 48 I.A. 76; I.L.R. 48 Cal. 481 (P.C.)
4. (1938) 1 M.L.J. (N.R.C.) 34.

SUSHIL KUMAR GHATIK *v.* SATYA GOPAL CHATTERJI, I.L.R. (1940) 1 Cal. 153.

In this case, the learned Judges have held that a purchaser under a private sale from a judgment-debtor after the sale of an agricultural holding under Chapter XIV of the Bengal Tenancy Act and before its confirmation is a person whose interests are affected by the sale within the meaning of S. 174 (1) of the Act and is entitled to get the sale set aside under that section. The provisions of S. 174 (1) entitle "any person whose interests are affected by the sale" to apply to set aside the sale under the Bengal Tenancy Act. In this respect, the terms of the section bear a close resemblance to those of O. 21, r. 90 of the Civil Procedure Code, which also entitles "any person whose interests are affected by the sale to apply for setting aside the sale". Under this rule, it has been held by a single Judge of the Calcutta High Court in *Kiran Bala* v. *Suniti Prova*[1], that a purchaser from a judgment-debtor after the Court sale is not entitled to apply for setting aside the sale, under O. 21, r. 90 of the Civil Procedure Code. In this latter case, the learned Judge has held that the applicant should have had a subsisting interest on the date of the execution sale and that as the subsequent purchaser had no such interest, he could not apply.

The learned Judges in the case under notice have pointed out that there is nothing in S. 174 (1) of the Bengal Tenancy Act to indicate that the interest of the person making the application for setting aside the sale must be in existence on the date of the sale. These observations apply with equal force to the provisions of O. 21, r. 90 of the Civil Procedure Code. If the legislature had intended to restrict the right to persons who had an interest on the date of the sale, it could well have used the language similar to O. 21, r. 89 of the present Code of Civil Procedure.

There is a conflict of opinion on the question whether an execution purchaser would come within those words of O. 21, r. 90. The Calcutta High Court, the Lahore High Court and the Rangoon High Court have held that if his interest is not anterior to the sale, he could not apply to set aside the sale under O. 21, r. 90 of the Civil Procedure Code. (See *Surendra Nath Das* v. *Alauddin Mistry*[2], *K. V. A. L. Chettiar Firm* v. *M. P. Maricar*[3] and *Nihal Chand Gopal Das* v. *Pritam Singh*[4].) On the other hand, the Madras High Court, the Allahabad High Court and the

1. I.L.R (1939) 1 Cal. 273.
2. (1928) 49 C.L.J. 207: A.I.R. 1928 Cal 828.
3. (1928) I.L.R. 6 Rang. 621: A.I.R. 1929 Rang. 33.
4. (1932) I.L.R. 14 Lah. 1: A.I.R. 1932 Lah. 468.

latest decision of the Patna High Court have held that the auction purchaser is entitled to apply for setting aside the sale under O. 21, r. 90. (See *Gopala Krishnayya* v. *Sanjeevareddi*[1], *Ravinandan* v. *Jagarnath*[2] and *Mahadeo Ram* v. *Raja Mohan Vikram Sah*[3], overruling *Khetro Mohan Datta* v. *Sheikh Dilwar*[4].) We venture to submit that on the plain language of O. 21, r. 90 of the Civil Procedure Code, as contradistinguished from that of O. 21, r. 89, the view of the Madras, Allahabad and Patna decisions seems to be well founded. The decision under notice also lends colour to the same view.

The learned Judges in the present case however seem to distinguish the case of rent sales under the Bengal Tenancy Act from those of sales under the Civil Procedure Code by reason of the fact that the title of the purchaser under a rent sale only commences from the date of confirmation while in the case of an execution sale under the Civil Procedure Code, on confirmation of the sale, the title of the purchaser relates back to the date of the sale. We are not however sure that this distinction has any bearing on the question of the construction of O. 21, r. 90 of the Civil Procedure Code, or of S. 174 (1) of the Bengal Tenancy Act. On the date of the application to set aside the sale and before the date of its confirmation, even under the Civil Procedure Code, the title remains with the judgment-debtor and he cannot be ousted from possession by the auction purchaser. (See *Mukhi Narumal Tilokchand* v. *Allabhux Bahadur*[5] and *Ghirdhari Lal* v. *Mohd. Ishrat Ali*[6].) Reference may be made by way of analogy to S. 28 of the Provincial Insolvency Act under which though the title relates back on the adjudication to the date of the petition in insolvency, until adjudication the title to the property remains with the debtor. *See* Mulla's Law of Insolvency, page 414.

It may be noticed that under the Code of Civil Procedure of 1882, it was held by the Madras High Court under S. 310-A that a purchaser from the judgment-debtor after the execution sale could deposit the amount into Court and have the execution sale set aside, *Appayya Shetti* v. *Kunhati Beari*[7] and *Manicka Odayan* v. *Rajagopala Pillai*[8], though the contrary view had been taken in *Hasari Ram* v. *Badai Ram and Nanda Lal*[9]. The Code has since been amended. We, however, refer to these cases to show that

1. (1919) 38 M.L.J. 228: 55 I.C. 333.
2. (1925) I.L.R. 47 All. 479.
3. (1933) I.L.R. 12 Pat. 665.
4. (1918) 3 P.L.J. 516.
5. A I R. 1933 Sind 198 at 200.
6. (1937) O.W.N. 1153 at 1156.
7. (1906) 17 M.L.J. 127 : I.L.R. 30 Mad 214.
8. (1907) 17 M.L.J. 291 . I.L.R. 30 Mad. 507.
9. (1897) 1 C.W.N. 279.

even after execution sale the judgment-debtor has a saleable interest in the property and it will be affected by the sale being confirmed, Cf. *Sundaram* v. *Mausa Mavuthar*[1]. This view supports the construction placed on S. 174 (1) of the Bengal Tenancy Act that the sole criterion for determining whether a person's interest is affected by the sale is to find out whether his interest will be affected if the sale be ultimately confirmed. We venture to submit that is the correct test to be applied and judged by this test the decision in *Kiran Bala Saha* v. *Suniti Prova Saha*[2], under O. 21, r. 90 of the Code of Civil Procedure, may require reconsideration.

GOKHUL MAHTON *v.* SHEO PRASAD LAL SETH, I.L.R. (1939) Pat. 459 (F.B.).

The proper article of the Limitation Act applicable to a suit for recovery of unpaid instalments due under an ordinary money instalment bond with a defeasance clause and the starting point of limitation in such a case were the main points decided in this case. It was held that Art. 75 would apply and that time will begin to run from the date of the first default where there was no waiver of it, and from the date of the fresh default where there was a waiver. Some of the earlier decisions had, on the analogy of mortgage bonds payable by instalments and containing defeasance clauses, taken the view that the plaintiff was entitled either to bring his action when any instalment became due or to wait until the whole became payable —*Rup Narain Bhattacharya* v. *Gopi Nath Mandol*[3], *Ramchandra Nayak* v. *Gharbaran Ahir*[4], etc. This view overlooked the difference in the language contained in the third column of Arts. 75 and 132 respectively. Under Art. 132, limitation starts from the time *when the money sued for became due*, whereas under Art. 75 time begins to run from the date *when the default is made*. A mortgage is for a term certain, which may be as much for the benefit of the mortgagee as of the mortgagor, though the default clause is exclusively for the benefit of the mortgagee. Thus the mortgagee may either sue on default or wait. Limitation will start only from the date when the period stipulated under the mortgage document expired, although a default by the mortgagor had occurred during that period and by the terms of the mortgage, the mortgagee thereupon had an immediate right to enforce the mortgage, *Lasa Din* v. *Gulab Kunwar*[5],

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1. (1921) 40 M.L.J. 497 : I.L.R. 44 Mad. 554 (F.B.).
2. I.L.R. (1939) 1 Cal. 273.
3. (1907) 11 C.W.N. 903.
4. (1930) 132 I.C. 112.
5. (1932) 63 M.L.J. 187 : L.R. 59 I.A. 376 : I.L.R. 7 Luck. 442 (P.C.).

Panchain v. *Ansar Husain*[1] and *Narna* v. *Ammani Amma*[2]. But Art. 75 is in very special terms and on the happening of the default the cause of action arises. In the case of ordinary instalment bonds with a defeasance clause, as pointed out by Lord Denman in *Reeves* v. *Butcher*[3], if the plaintiff "chose to wait till all the instalments fell due, no doubt he might do so; but that which was optional on the part of the plaintiff would not affect the right of the defendant, who might well consider the action as accruing from the time that the plaintiff had a right to maintain it. The Statute of Limitation runs from the time the plaintiff might have brought his action."

Nor is it that Art. 74 which applies to instalment bonds generally will govern where the creditor did not choose to sue on the default clause for the entire amount. To so hold will be to render Art. 75 nugatory and redundant. Art. 74 can apply only where there is no default clause, and where there is one it is Art. 75 that will operate. After *Lasa Din's case*[4] the Allahabad High Court has consistently held that in the case of a simple money bond payable by instalments with a default clause, Art. 75 applies and time runs from the date of the first default, *Jawahar Lal* v. *Mathura Prasad*[5] and *Sukh Lal* v *Bhoora*[6]. The present decision takes the same view of the question.

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1. (1926) L.R. 53 I.A. 187: I.L.R. 48 All. 457 (P.C.).
2. (1916) 31 M.L.J. 865: I.L.R. 39 Mad. 981.
3. (1891) 2 Q.B. 509.
4. (1932) 63 M.L.J. 187: L.R. 59 I.A. 376: I.L.R. 7 Luck. 442 (P.C.).
5. (1934) I.L.R. 57 All. 108 (F.B.).
6. (1934) I.L.R. 57 All. 561.

PAVAYI *v.* PALANIVELA GOUNDAN, (1940) 1 M.L.J. 766 (F.B.).

The question in this case was whether a mortgagor who has lost all interest in the mortgaged property and the personal covenant against whom has become barred, can by an acknowledgment within the meaning of S. 19 or by part payment within the meaning of S. 20 of the Indian Limitation Act bind the person on whom his interest has devolved. Four different views have been expressed as to the effect generally of an acknowledgment by a mortgagor on assignees from him of the mortgaged property. One view is that the acknowledgment cannot at all bind any prior assignee, per Mookerjee, J., *Surjiram Marwari* v. *Barhamdeo Prasad*[1]; *Yagnanarayana* v. *Venkatakrishna*[2]; see also *Baldeo Prasad* v. *The Collector of Philibhit*[3], *Rajeshwari* v. *Binoda*[4] etc. According to the second view the acknowledgment will bind the prior assignees from the mortgagor only if at the time of making it he had retained a substantial interest in the mortgaged properties, *Krishnachandra Saha* v. *Bhairab Chandra Saha*[5], *Lakshmanan Chetty* v. *Muthaya Chetty*[6], per Krishnan Pandalai, J., in *Muthu Chettyar* v. *Muthuswami Iyengar*[7]. A third view is that the acknowledgment will bind all the assignees, prior as well as subsequent—per Jackson, J., in *Muthu Chettyar* v. *Muthuswami Iyengar*[7]; *Narayana* v. *Venkataramana*[8]. According to the fourth view it is the character of the acknowledgment and not the time when it is made that affects the result. The test will be whether the acknowledgment was lawful *i.e.*, not a merely friendly or collusive act between the mortgagor and the mortgagee, *Arabindakeb* v. *Jageshar Rai*[9]. It is submitted that the first of these views alone is warranted by the language of S. 19. The statute of Limitation is not a statute of repose. Equitable considerations are out of place in its construction and the strict grammatical meaning of the words is the only safe guide, *Nagendranath De* v. *Suresh Chandra De*[10]. S. 19 expressly states that acknowledgment, where it is not by the party sought to be charged in the suit, furnishes a fresh start only if it had been made by "some person through whom he derives title or liability." The user of the present tense indicates that the title contemplated as being bound is one assigned by the mortgagor subsequent to the acknowledgment. A similar construction has been adopted regarding the expression "parties under whom they or any of them claim" in S. 11 of the C. P. Code, *i.e.*, that to make a person privy to an action he must have acquired an interest either by inheritance, succession, or purchase from a party *subsequent* to the action. If this be right, then

1. (1905) 1 C.L.J. 337.
2. A.I.R. 1925 Mad. 1108.
3. (1914) I.L.R. 37 All. 113.
4. (1916) 44 I.C. 533.
5. (1905) I.L.R. 32 Cal. 1077.
6. (1919) 40 M.L.J. 126.
7. (1932) 63 M.L.J. 111=I.L.R. 55 Mad. 758.
8. A.I.R. 1935 Mad. 899.
9. (1919) 17 A.L.J. 763.
10. (1932) 63 M.L.J. 329=I.L.R. 60 Cal. 1=L.R. 59 I.A. 283 (P.C.).

it is wholly immaterial whether the mortgagor has at the time of making the acknowledgment any substantial interest in the mortgaged property or not. Further acknowledgment being a statement against one's interest can affect only such interest as one has at that time and cannot fasten on an interest that had already been conveyed. The decision under review has adopted this conclusion and this is in consonance with the view indicated in *Bolding* v. *Lane*[1] and *Newbould* v. *Smith*[2].

As regards the effect of part payment of interest or principal, different provisions existed in English law according as the debt was one charged upon the land or a specialty debt merely. The statute 3 and 4, Wm. IV, C. 27, Ss. 40 and 42 governed the former as regards recovery of the sum secured or the interest thereon respectively. In regard to bond debts S. 5 of 3 & 4 Wm. IV., C. 42 operated. Though these statutes had postulated that acknowledgment would save limitation only if made by the person 'by whom the amount was payable' in the one case and by 'the party liable on the indenture' in the other case, so far as part payment was concerned they did not specify by whom it should be made. It was however held that the payment relied on should have been made by "a party interested" or "concerned to answer the debt" and not by a "stranger," *Roddam* v. *Morley*[3], *Chinnery* v. *Evans*[4], *Lewis* v. *Wilson*[5], *In re Lacey*[6]. S. 20 of the Indian Limitation Act has embodied practically the same rule. Under it the part payment of interest as such or of the principal should be by "the person liable to pay the debt" or "the debtor" respectively or by the agent of such person duly authorised in that behalf. The effect of payment by a proper person is in English law to keep alive the right of action in all its original integrity and force and set the action free against all the persons interested, a consequence resting on the joint liability of a number of persons standing in equal peril of suit and who all benefit by the discharge of all or any part of such liability, *In re Lacey*[6]. There is however a cleavage of opinion as to the effect of payment by a mortgagor on the prior assignees from him of mortgaged items. At one end it has been held that a mortgagor who has parted with the equity of redemption completely is not 'a person interested' and a payment by him would not prevent limitation running against the assignees of the equity of redemption *Newbould* v. *Smith*[2]. At the other end the suggestion seems to be that even if the properties sought to be bound are with assignees, so long as the personal liability remains, a payment by the mortgagor would bind the prior assignees from him,—see *Velayudha* v. *Vaithialinga*.[7] In between these two views there is another line of thought, that at

1. (1863) 1 De. G. J. & S. 122=46 E.R. 47.
2. (1886) 33 Ch. D. 127.
3. (1857) 1 De.G.& J. 1=44 E.R. 622.
4. (1864) 11 H.L.C. 115.
5. (1886) 11 A.C. 639.
6. (1907) 1 Ch. 330.
7. (1912) 24 M.L.J. 66.

any rate if the mortgagor making the payment has at that time some interest in the mortgaged properties, prior assignees from him would be bound by such payment. *Chinnery* v. *Evans*[1-2], *Krishna Chandra* v. *Bhairab Chandra*[3], *Domi Lal Sahu* v. *Roshan*[4]. The correctness of the rule laid down by the Court of Appeal in *Newbould* v. *Smith* seems to have been questioned in England itself, though the House of Lords has left the matter open[5]. Even where the mortgagor has parted with the equity of redemption in its entirety, still he will not cease to be a 'debtor' within the meaning of S. 20 so long as the personal remedy against him is not barred, and as such he will be competent by his payment to afford a fresh starting point of limitation. In the decision under review the learned Chief Justice has stated: "In certain of the cases........the mortgagor retained an interest in part of the mortgaged properties sold, but I do not consider that this makes any difference in principle.... If he cannot bind the purchaser of the equity of redemption, when the purchase covers the whole of the mortgaged properties obviously he cannot bind the purchaser of part of the mortgaged properties." This is an *obiter dictum* but the position so stated does not seem to allow for the rather wide language in S. 20 which on the principles of the English rulings like *Roddam* v. *Morley*[6], enable any person 'interested' in the property or 'concerned to answer the debt' to give a fresh start, setting free thereby the action against all persons interested in the property. The reason is that the integrity of the mortgagee's right cannot in any wise be affected by any subsequent dealing of the mortgagor with the equity of redemption, see *Chinnery* v. *Evans*[1-2]. The decision in *Bolding* v. *Lane*[7] on which reliance was placed was one concerning the effect of an acknowledgment by a mortgagor under 3 & 4, Wm. IV, C. 27, S. 42 on the puisne mortgagee's liability regarding arrears of interest due to a prior mortgagee and cannot govern a case of part payment under S. 20 of the Indian Act, resting on entirely different considerations, particularly in view of the later ruling of the House of Lords in *Chinnery* v. *Evans*[1-2] as to the effect of a part payment by a mortgagor on prior assignees from him of the equity of redemption of some of the mortgaged items.

RAMACHANDRA RAO *v.* PARASURAMAYYA, I.L.R. (1940) Mad. 349=(1940) 1 M.L.J. 235 (F.B.).

This Full Bench decision holds that the bar of execution of decree after the lapse of twelve years from the date of the decree sought to be executed, prescribed in S. 48, C. P. Code is absolute and that any

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1-2. (1864) 11 H.L.C. 115.
3. (1905) I.L.R. 32 Cal. 1077.
4. (1906) I.L.R. 33 Cal. 1278.
5. (1889) 14 A.C. 423, 426, 428.
6. (1857) 1 De. G. & H. 1=44 E.R. 622.
7. (1863) 1 De. G. & J. & S. 122=46 E.R. 47.

amendment of the decree will not have the effect of affording a fresh start for purposes of limitation. Different views have been held on this question as is apparent from the decisions. One view is that the expression 'decree sought to be executed' in S. 48 is wide enough to include the amended decree so as to make the date of the amendment a fresh starting point of computation of the twelve year period see *Baldeo Shukul* v. *Syed Yusuf*[1]. Another view is that where the original decree was incapable of execution and amendment of it was therefore necessary it is the date of the amended decree that would furnish the starting point, *Muhammad Sulaiman Khan* v. *Muhammad Yar Khan*[2], *Narhar Raghunath* v. *Krishnaji Govind*[3], *Venkatamma* v. *Manikyam Nayani*[4]. Yet another view is that no execution at all is permissible after twelve years from the date of the original decree and it is entirely irrelevant whether the decree was amended or not subsequently, see *Pydel* v. *Chathappa*[5], *Parameshrayya* v. *Seshagiriappa*[6], *Narasing Rao* v. *Bando Krishna*[7], *Faqir Chand* v. *Kundan Singh*[8], *Ganesh Das* v *Kishan Das*[9], *Mst Dulhin* v. *Mahanath Harihar Gir*[10]. The last of these constructions seems to represent the position correctly. Art. 179 of Sch. II of the Limitation Act of 1877 prescribed three years from the date of the decree for purposes of execution and there was no provision for the period to run from the date of the amended decree. Art. 182 of the Limitation Act of 1908 however made provision for the same, but prescribed that the article shall apply only "for the execution of a decree or order of any Civil Court not provided for by Art. 183 or S. 48, C. P. Code 1908." This can only mean that where execution stands controlled by S. 48, C.P. Code, Art. 182 of the Limitation Act will afford no help. S. 48 of the C.P. Code in this matter has been left unamended all along, suggesting that it has been so left advisedly. The twelve year period thereunder is directed to be computed from the date of the decree sought to be executed. Under O. 20, r. 7 the decree is to bear the date of the judgment. So even if there is any amendment of the decree to make it conform to the judgment, the date of the decree will still be the date of the judgment only. Again an amendment is in no sense a novation. It merely expresses the real intention which the decree was intended to express but which it did not completely express. It does not vary the transaction in substance but merely rectifies the inaccurate description. Hence the amended decree should be deemed to be in force from the date of the original decree and limitation will start running from that date alone. The decision under review takes the same view and definitely brings the law in Madras in line with that prevailing in the other provinces.

1. (1921) 60 I.C. 318.
2. (1894) I.L.R. 17 All. 39.
3. (1912) I.L.R. 36 Bom. 368.
4. (1914) 26 I.C. 244.
5. (1890) I.L.R. 14 Mad. 140.
6. (1899) I.L.R. 22 Mad. 364.
7. (1918) I.L.R. 42 Bom. 309.
8. (1932) I.L.R. 54 All. 622.
9. A.I.R. 1935 Lah. 292.
10. (1939) I.L.R. 18 Pat. 395.

VENKATA GOPALA NARASIMHA RAO v. VENKATARAMAYYA, (1940) 2 M.L.J. 257 (F.B.).

The question that fell to be decided in this case was whether an income-tax return and the statements accompanying it are public documents of which certified copies would be admissible in evidence. The Evidence Act allows secondary evidence to be given of public documents (S. 65); certified copies would constitute such evidence, (S. 77), and such copies can be obtained according to S. 76 by persons having a right to inspect the originals. Documents forming the acts or records of the acts of public officers would be public documents under S. 74. It was held in some cases that the term 'act' in the context means an act of the nature indicated in S. 78, *i.e.*, a final completed act as distinguished from an act of a preparatory or tentative character and that it is only a document recording such a completed act that would be a public document, per Shepherd, J., in *Empress* v. *Arumugham*[1]; *Chandi Churn* v. *Boistab Churn*[2]. Agreeably to such a construction it was held in a number of cases that an income-tax return was not a public document, *Anwar Ali* v. *Tafozal Ahmed*[3], *Devidatt* v. *Shriram*[4], *Venkataramana* v. *Varahalu*[5], *Varadarajan Chetty* v. *Kanakaiah*[6]. In *Mythili* v. *Janaki*[7], it was held that it is only the notice of demand under S. 29 of the Income-tax Act, in which the Income-tax Officer communicates his decision to the assessee and not any earlier statement made or return submitted by the assessee to such officer that can be regarded as the record of the acts of the officer. Though in that case the contention that the return which forms the basis of the assessment should be deemed to be a part of the act of the Income-tax Officer or part of the record of such act was repelled as "absurd" on the very face of it, it has however been accepted by the Full Bench in the instant decision. The learned Chief Justice has stated how "it would be putting an unwarranted restriction on the words 'documents forming the acts or record of the acts' to say that they should be confined to those parts of an income tax record which the Income-tax Officer has himself prepared and to exclude documents which he has himself called for or which have been admitted to the record for purposes of the assessment."

In effect, the decision under notice constitutes a repudiation of the strict interpretation of S. 74 favoured by Shepherd J., in *Empress* v. *Arumugham*[1], The adoption of a liberal construction is supported by the English Practice also. Under the English Public Record Office Act, 1838, depositions, affidavits, bills, answers etc., filed in

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1. (1896) 7 M.L.J. 167=I.L.R. 20 Mad. 189 (F.B.).
2. (1903) I.L.R. 31 Cal. 284.
3. (1924) I.L.R. 2 Rang. 391.
4. (1931) I.L.R. 56 Bom. 324.
5. (1938) 50 L.W. 681.
6. (1939) 1 M.L.J 791.
7. I.L.R. 1940 Mad. 329.

Court, though not records in the strict sense of the term are yet deemed to partake so much of their nature that they are allowed to be proved by means of copies to the same extent as records proper[1]. O. 37, r. 4, of the Supreme Court Rules renders office copies of writs and pleadings admissible in evidence in all causes and matters and between all persons and parties to the same extent as the original would be admissible[2]. In India also it has been held that a petition which was the subject matter of an order passed would be a part of the record, *Bhagain Megh Ranee Koer* v. *Gooroo Pershad*[3], likewise the plaint filed in a suit, *Shazada Mahomed Shahaboodeen* v. *Wedgeberry*[4], *contra Tarakeshwar* v. *Devendra*[5]. By parity of reasoning the return made to the Income-tax Officer on which he passes the assessment order would be part of the record of the acts of that officer.

Paragraph 85 of the Instructions compiled by the Income-tax Department for the guidance of its officers provides for inspection being allowed to a party making the return as well as to any partner of the firm to which the return relates. Rule 99 of the Income-tax Rules provides for the grant of certified copies. It is thus open to a party making the return or to any partner where the return relates to a firm to obtain lawfully a certified copy thereof. The copy being one given to a person entitled to inspect and of a public document it would be admissible as secondary evidence in the absence of any statutory prohibition of its reception. Does S. 54 of the Income-tax Act constitute such a bar? Sub-section 1 of that section declares the particulars contained in the return to be confidential and provides that no Court shall require except in the specified cases any public servant to produce such a document. Sub-section 2 penalises the disclosure of such particulars. The purpose of the section is no doubt to afford protection to the assessees from any possible user against them of the information imparted in the Income-tax returns by third persons[1]. The section does not however render inadmissible in evidence the certified copies of such returns; nor is any policy of the law defeated where the very person who made the return proposes to prove its contents or where one partner of a firm uses it against the other partners. Any argument depending merely on the possible intention of the legislature as rendering the document inadmissible apart from the actual language of S. 54 will be no sufficient ground for shutting out such evidence.

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1. Taylor on Evidence, S 1534.
2. See also R. v. Scott, (1877) 2 Q.B D. 415.
3. (1876) 25 W.R. 68.
4. (1873) 10 Ben.L.R. App. 31.
5. A.I.R. 1926 Pat. 180.

AMBU BAI AMMAL *v.* SONI BAI AMMAL, (1940) 2 M.L.J. 298 (F.B.).

In this case it has been held that a sonless destitute widowed daughter is entitled to maintenance out of her father's estate in the hands of his heirs. It is rather curious that there should be a paucity of direct textual authority in regard to this question. Manu has declared the maintenance of an infant child (शिशुः सुतः) to be a personal obligation of the father. This is in conformity with the Law of Nature as well as that of civilized communities. Infancy in the case of a daughter has been practically equated with the period prior to marriage. For on marriage the obligation is shoved on to the husband whose duty it becomes to maintain his chaste wife (साध्वी भार्या) thereafter. Does that mean that the parental obligation is extinguished or merely remains suspended so long as the husband and his family can maintain her? Some cases take the view that on marriage a daughter ceases to be a member of her father's family, *Janki* v. *Nandram*[1], *Kartick Chunder Ghuttuck* v. *Saroda Sundari Debi*[2], *Bachadi* v. *Udai Singh*[3], that marriage detaches the status of the girl from the parental family and attaches it to that of her husband or his father, *Mokhada Dassee* v. *Nundo Lall Haldar*[4], that she becomes incorporated in her husband's family[5] and is born again in that family, *Janki* v. *Nandram*[1]. Applying the theory of cessation in the parental family and substitution in the husband's family it has sometimes been stated that a destitute married daughter will have only a moral and social but not a legal right to maintenance in the parental family even after the father's death leaving property—*see Janki* v. *Nandram*[1], *Bai Mangal* v. *Bai Rukmini*[6], *Shanmugha Velayudhan* v. *Koyappa*[7]. A contrary view has been taken by Miller and Sadasiva Aiyar JJ., in *Venkatarazu* v. *Kotayya*[8], and in the opinion of Sadasiva Aiyar, J., such a daughter will have a legal right to maintenance even while her father was alive. The Calcutta High Court has pursued an intermediate course: According to Ameer Ali, J., if a daughter and son-in-law had been in fact maintained by the father as dependent members of his own family it will ripen into a legal obligation against the heirs inheriting her father's estate, *Mokhada Dassee* v. *Nando Lall Haldar*[4]. A Full Bench of that Court held in the same case on appeal that the real test will be to see, whether the husband's family is not in a position to maintain her[5].

To push the analogy of marriage operating as a rebirth of the girl in her husband's family to its extreme limit will be to carry legal

1. (1888) I.L.R. 11 All. 194, 208 (F.B.).
2. (1891) I.L.R. 18 Cal. 642, 646.
3. (1933) I.L.R. 55 All. 487.
4. (1900) I.L.R. 27 Cal. 555, 562.
5. S. C. on appeal (1901) I.L.R 28 Cal. 278, 287 (F.B.).
6. (1898) I.L.R. 23 Bom. 291.
7. 1920 M.W.N. 679.
8. (1912) 23 M.L.J. 223.

fictions to absurd lengths. Marriage of a girl is not like the adoption of a boy. In adoption the boy sheds his status as a son in one family and stands invested with the same status in another. A daughter however never ceases to be a daughter though she becomes a wife and acquires membership in her husband's family. That is the reason why her rights of inheritance in the parental family remain preserved despite her marriage. Surrender by a widow though spoken of as a "figurative suicide" by her leaves her very much alive for purposes of adopting a son to her husband or claiming maintenance out of his estate, for surrender does not destroy her status as her husband's widow. In a like manner a daughter's status is not destroyed by her marriage. The obligation to maintain a daughter is the consequence of parentage, *Kusum* v. *Krishnaji*[1], and will ordinarily continue so long as that relationship subsists and the daughter is actually dependent on the father for her subsistence. Such dependence may arise either during her husband's lifetime or after his death by reason of the destitution of the husband and his family. Under such circumstances the policy of the shastras is to regard the daughter as आमाप्य पोष्या, as one who should be maintained by her parents. Manu has enjoined upon the head of a family the duty of maintaining all the poor dependents दीनाः समाश्रिताः A destitute married daughter might well fall within the ambit of that expression, but it is difficult to interpret the text as importing a legal obligation, for in the context the duty of maintaining the poor dependents is clubbed along with the duty of providing maintenance to guests and mendicants which obviously can only be a moral obligation. Shyama Charan Sarkar has stated that according to the Shastras a sonless widowed daughter would be entitled to maintenance as a dependent member of her father's family[2], and Justice Norris is reported as having said :" Even if there be a shred to hang a peg on to support this decision we will do it."[3] The view taken by the Courts that there is no legal obligation on the part of a father to provide for the marriage expenses of his daughter in the absence of ancestral property has largely reacted on the nature of the daughter's right to maintenance and though much can be said in favour of the *obiter dictum* of Sadasiva Aiyar, J., in *Venkataraju* v. *Kotayya*[4], that a married daughter will have a legal right personally against her father for maintenance where he has means and she is destitute, no Court has so far affirmed that view directly.

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1. (1938) I.L.R. 1939 Bom. 396.
2. Vyavastha Darpana, (2nd edition), p. 170.
3. Cit., in Sarkar Sastri's Hindu Law, 8th edition, p. 535.
4. (1912) 23 M.L.J. 223.

Assuming that a father is only under a moral and social but not a legal obligation to maintain his destitute daughter out of his self acquired property there seems to be very little reason for denying to her a legal right to be maintained from such property after it has devolved on his heirs. The nearness of the relationship between her and the deceased and considerations of natural love and affection can point only to that conclusion. If a daughter-in-law will have a legal claim for maintenance against her father-in-law's self acquired property in the hands of his heirs the claim of a daughter will stand almost *a fortiori*. The view of Ranade J., in *Bai Mangal* v. *Bai Rukhmini*[1], stands as an isolated instance of the negation of such right. An heir succeeding to property takes it subject to a legal obligation to maintain persons whom the late proprietor was legally or morally bound to support, and who all were so entitled to be morally supported by the deceased will no doubt depend on the relationship, the means and other circumstances of the late proprietor as well as on the principles of Hindu Law and the usages and practices of the people, *Kamini Dassee* v. *Chandra Pode Mondle*[2]; see also *Rajjmoney Dossee* v. *Shib Chunder*[3], *Khetramani Dasi* v. *Kashinath Das*[4], *Janki* v. *Nandram*[5], *Yamuna Bai* v. *Manu Bai*[6], *Mt. Bholi Bai* v. *Dwarka Das*[7] and *Rajani Kanta Pal* v. *Sajani Sundari Dassya*[8].

The case under review is noteworthy as being almost the first of its kind regarding the maintenance right of a daughter whose father had predeceased her husband against the estate of the former. If the principle be that inability of the husband and his family to maintain her would give rise to a moral obligation against the father, then it will be immaterial whether her husband had predeceased her father or died subsequently. If, on the other hand, the obligation against her father even in a moral sense can spring into existence only on the death of her husband, his family being destitute, then in the present case there would have been no such obligation against the father and as such there would be no obligation enforceable against his estate after his death. The decision under review must be taken to have affirmed the former of these two views.

DURAISWAMY IYENGAR *v.* RAGHAVACHARIAR, (1940) 2 M.L.J. 648.

This case decides an important point in the law of appropriation. It holds that an open payment by an agriculturist debtor before

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1. (1898) I.L.R. 23 Bom. 291.
2. (1889) I.L.R. 17 Cal. 383.
3. 2 Hyde 103.
4. (1868) 2 Beng.L.R. A.C. 15 (F.B.).
5. (1888) I.L.R. 11 All. 194 (F.B.).
6. (1899) I.L.R. 23 Bom. 608.
7. (1924) 5 Lah. 375.
8. (1933) I.L.R. 61 Cal. 228 (P.C.).

1st October 1937 towards a promissory note cannot be theoretically appropriated towards the interest due under the note and in the absence of *actual* appropriation that way such interest will be deemed to be outstanding on 1st October, 1937 and as such wiped off under S. 8 of the Agriculturists Relief Act. In coming to that conclusion the learned Judges have argued firstly, that the rule that payments are to be applied first towards interest is more a rule for the guidance of the Court than a presumption of law regarding what has in fact been done, and secondly, that the rule that a notional appropriation cannot take the place of an actual appropriation for purposes of S. 20 of the Limitation Act will equally govern questions of appropriation as between capital and interest under Madras Act IV of 1938. It is submitted that the conclusion as well as the reasoning are weak. The general law as to appropriation is well settled. While making a payment, a debtor has the right to intimate how it is to be appropriated and the creditor must apply it accordingly, *Cory Brothers Co.*, v. *Owners of the Turkish Steamship* "*Mecca*"[1]. The intimation should be synchronous with the payment or made within a reasonable time thereafter, *Cory's case*[1]. If the debtor fails to so intimate his intention he loses his right in this behalf altogether, *Sreenivasachariar* v. *Krishnaiah Chetty*[2], and the right of application devolves on the creditor, *Cory's case*[1]; Halsbury's Laws of England (Hailsham edition) Vol. 7, p. 244, para 335. The view taken in *Cheggannmull Sowcar* v. *Manicka Mudaliar*[3], that so long as neither debtor nor creditor has made an appropriation, the debtor can intimate the appropriation he wishes, has not been supported by later decisions and is also inconsistent with the theory of the right having devolved on the creditor on failure of intimation by the debtor either immediately on payment or within a reasonable time thereafter. The creditor acquires a right to have the appropriation made in the manner best advantageous to him, *Bamundoss Mookerjea* v. *Omeish Chunder Raee*[4], *Nemi Chand* v. *Radha Kishen*[5]. He has the right of election up to the "very last moment," *Cory's case*[6], even while in the witness box, *Seymour* v. *Pickett*[7], or before judgment is delivered, *Gajram Singh* v. *Kalyan Mal*[8]. What is the 'last moment' must depend upon the circumstances of each case.[9] The right may

1. (1897) A.C. 286.
2. (1940) 1 M.L.J. 860.
3. (1925) 50 M.L.J. 242.
4. (1856) 6 Moo.I.A. 289.
5. (1921) 26 C.W.N. 153.
6. (1897) A.C. 286; See also Krupasindhu Sahu *v.* Raja of Khallikota, (1915) 29 I.C. 718; Munisami Mudali *v.* Perumal Mudali, (1919) 37 M.L.J. 367; Relu Mal *v.* Ahmed (1925) I.L.R. 7 Lah. 17; Maistry *v.* Jameson, (1925) I.L.R. 5 Pat. 326; Kunjamohan Shaha Poddar *v.* Karunakanta Sen Chaudhuri, (1933) I.L.R. 60 Cal. 1265; Ram Nath *v.* Chiranji Lal, (1934) I.L.R. 57 All. 605 (F.B.).
7. (1905) 1 K.B. 715.
8. (1935) I.L.R. 57 All. 791 (F.B.).
9. Per Romer L.J., in Seymour *v.* Pickett, (1905) 1 K.B. 715, 725.

be exercised until the creditor has finally exercised the right or something has happened to render it inequitable for him to exercise it[1]. If the payment is open and there is no specific appropriation by either debtor or creditor, the creditor has a right to consider it as a payment on account of interest, *Luchmeshwar* v. *Syad Lutf Ali Khan*[2], for the rule is that the money is first applied in payment of interest and then when that is satisfied in payment of the capital, *Venkatadri Appa Rao* v. *Parthasarathy Appa Rao*[3]. This is the well settled practice of the Courts, *Maharaja of Benares* v. *Har Narayan Singh*[4]. Where the creditor receives an open payment from the debtor without any appropriation of it as between capital and interest by either debtor or creditor, and it is left to the Court to construe the effect of the payment, the *presumption* arises that the payment is *attributable* in the first instance towards outstanding interest and the presumption is operative in questions between debtor and creditor primarily, *Commissioner of Income-tax, Bihar and Orissa* v. *Maharajadhiraja of Dharbhanga*[5]. The presumption is that what would have been done by the creditor in the ordinary course has in fact been done; in other words, the Court will do what the parties are in conscience bound to do,—see *Moonsappah* v. *Venkataraydoo*[6]. This is not a principle for the guidance of the Court merely but constitutes a presumption of what in fact has been done. The debtor has a right to express his intention, but if he failed to intimate the same he loses the right effectively and will be deemed to have agreed to the appropriation of his payment by the creditor first to the outstanding interest. The creditor may not have exercised his right either. In such a case the Court will attribute the payment to interest first and will presume that it stands constructively so appropriated even at the time the payment was made. The presumption is, however, rebuttable and could be destroyed by proof that the creditor had in fact either expressly or impliedly elected to treat the payment otherwise. Where there is no such proof, but the creditor had remained silent the Court will draw the presumption as one founded upon the debtor's intention. In so far as the decision under review treats the rule as one for the guidance of the Courts only and not having any higher force it seems to run counter to Lord Macmillan's observations in the Patna case[7].

This presumption of law stands excluded for purposes of the Limitation Act by reason of the special language contained in S. 20 which declares that payment towards interest should have been made by the debtor "as such" for purposes of saving limitation.

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1. Halsbury's Laws of England, (Hailsham edition) Vol. 7, p. 246, para 337.
2. (1871) 8 Ben.L.R. 110, 112 (P.C.).
3. (1921) I.L.R. 44 Mad. 570 (P.C.).
4. (1905) I.L.R. 28 All. 25.
5. (1933) I.L.R. 12 Pat. 318, 331.
6. (1870) 6 M.H.C.R. 32.
7. (1933) 12 Pat. 318, 331 (P.C.).

It is positive and not any constructive intent of the debtor that that section contemplates as necessary. Absence of intimation by the debtor of his intention when he makes the payment has a negative value merely and does not afford proof of any positive intent on his part. In the absence of proof of positive intent, a payment will not amount to a payment of interest as such by reason merely of what Sir George Rankin calls " the old rule," namely, that it is the right of the creditor to have payments treated in account as liquidating the interest before principal, *Ram Shah* v. *Lal Chand*[1]. The Madras Agriculturists' Relief Act does not employ any similar language. To extend therefore the exclusion of the " old rule " to questions of appropriation between principal and interest for purposes of that Act seems to be hardly justified. There seems to be nothing in that Act to suggest that appropriation to interest must be specific and actual and not constructive or notional.

According to Act IV of 1938 interest will be wiped off only if it was in fact outstanding on 1st October, 1937. The provision is penal and therefore to be strictly construed. The burden is on the debtor to show that interest was actually outstanding on that date. Where the debtor had made a payment prior to that date he may prove an intimation by him that it was to be applied to principal only or he may prove acts, declarations and conduct on the part of his creditor suggesting an intention on the part of the latter to apply the amount otherwise than to interest. In the absence of such proof the presumption of law will apply, namely, that the payment should be attributed to interest outstanding in respect of the debt in the first instance, even at the time it was made, with the result that to the extent of such payment there will be no interest remaining due on 1st October 1937, for the provisions of Act IV of 1938 to operate.

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1. (1940) 1 M.L.J. 895, 903 (P.C.).

In the matter of an Advocate, I.L.R. 1940 All. 60 (F.B.).

This decision deals with an important point concerning the members of the legal profession, namely, within what limits an advocate can carry on money-lending transactions. In England, though there is an enumeration of offices which a practising Barrister cannot hold there is no rule in terms prohibiting a member of the Bar from entering into money lending transactions, see *Muni Reddi* v. *Venkata Rao*[1]. It is however always understood that a practising Barrister should conform to the rulings given from time to time concerning extra professional activities open to him and that if at any time he was in doubt as to the propriety or otherwise of undertaking a particular matter he should request the opinion of the profession in the absence of express rules on the point.[2] In India the rules framed under S. 15 of the Indian Bar Councils Act (XXXVIII of 1928) have prescribed that " no advocate while practising shall engage in trade or business or accept an appointment carrying a salary without previously obtaining the permission of the Bar Council and the High Court. Similar rules exist under the Legal Practitioners Act (XVIII of 1879) as well . Money-lending transactions by advocates without the prior sanction of the Bar Council will thus become reprehensible where they are carried on as a *business*. The line of demarcation between cases where the transactions afford evidence of a business pursued and cases where they don't cannot be defined with closeness or indicated by any specific formula. Each case must depend on its own facts, and it is ever a question of degree, *Edgelow* v. *MacElwee*[3]. The term business imports the notion of system, repetition and continuity[4]. It is the sum of acts repeated which constitutes the business, *Smith* v. *Anderson*[5]; *Kirkwood* v. *Gadd*[6]. There should be a series of acts done with the acquisition of gain for its object, *Smith* v. *Anderson*[5]. The nature and the number of the transactions have a material bearing, *Fagot* v. *Fine*[7]. An isolated transaction will not constitute a ' business,' *Newman* v. *Oughton*[8]. If the transactions are not habitual or systematic there is no proof of ' business,' *Halsbury's Laws of England* (*Hailsham edition*) vol. 32, p. 307, para 490; *Grainger & Son* v. *Gough*[9]. Lending at remunerative rates of interest will not *per se* be a proper test either, *Newton* v. *Pyke*[10].

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1. (1912) I.L.R. 37 Mad. 238 (F.B.).

2. Halsbury's Laws of England, (Hailsham edition), Vol. II, p. 509, para. 691.

3. (1918) 1 K.B. 205, 206.

4. *ibid.*; *Newton* v. *Pyke*, (1908) 25 T.L.R. 127; *Fagot* v. *Fine*, (1911) 105 L.T. 583.

5. (1879) 15 Ch. D. 247, 277.

6. (1910) A.C. 422, 431.

7. (1911) 105 L.T. 583.

8. (1911) 1 K.B. 792.

9. (1896) A.C. 325, 443.

10. (1908) 25 T.L.R. 127.

A person can be said to carry on a money-lending business only if he is ready and willing to lend to all and sundry provided that they are from his point of view eligible, *Litchfield* v. *Dreyfus*[1]. System, continuity, object, class of persons to whom money is lent, nature of the transactions and their number are the relevant criteria in judging whether the transactions are tantamount to the carrying on of a business. Eight instances spread over a period of three years, though speculative in character were held insufficient to make out a business, In re *Tika Ram, Vakil*[2]; a hundred transactions within the same period, some in his own name and others in the name of his son, were, however, held to be ample proof of money-lending being pursued as a business, *see Chinnarappa* v. *Thimma Reddi*[3]. In the decision under review an advocate had within the space of ten years advanced loans on twelve occasions, three on mortgages and nine on pro-notes, the former in the name of his son and the latter in his own name, and all of them were to friends and relatives. The Full Bench held that the case was one on the " border line " and that the advocate had " dangerously sailed near the wind."

Where an advocate happens to be a member of a joint and undivided Hindu family carrying on an ancestral money lending business, so long as he is not in charge of the business, his conduct will not be culpable, though he draws regularly a share of the profits of the business. If, however he enters into a partnership with the other members of the family in the starting of a new business there will be no protection afforded to him, where he has not obtained the previous sanction of the Court to his participating in the venture. Likewise where being the manager of the joint family, a practising advocate is looking after a family business as well without the Court's permission, his conduct will become reprehensible, *see Muni Reddi* v. *Venkata Rao*[4]. The Allahabad High Court has taken a slightly different view in one case, namely, that the running of an ancestral business may not amount to entering into a business but still it was proper that the advocate should give notice to the Court and obtain its permission, *see* In re *Tika Ram, Vakil*[2]. Likewise it will be unavailing for an advocate to plead that he is running the money-lending business not for his own gain nor with his own money but as the guardian of a minor, with the minor's funds and for the minor's benefit, *Chinnarappa* v. *Thimma Reddi*[3].

The Allahabad High Court has suggested in the instant decision that " it is in the interest of the advocates themselves that before they make advances by way of loans they should obtain the previous

1. (1906) 1 K.B. 584, 589.
2. (1919) I.L.R. 42 All. 125 (F.B.).
3. (1910) 8 I.C. 677.
4. (1912) I.L.R. 37 Mad. 238 (F.B.).

sanction of the Bar Council and of the Court." Couched in such terms the direction seems to be too wide and rather startling. Surely it cannot be intended that even where a legal practitioner gives loans to friends or relatives, on ordinary terms by way of assistance or accommodation such permission should be obtained. If in the case of even isolated transactions, the permission of the Bar Council and the Court is to be sought for the projected loan, the injunction will easily tend to become oppressive and unworkable in practice. If there is no question of a practising lawyer carrying on money-lending transactions as a business where is the need for any sanction of Court or of any other authority, except possibly where the advocate occupies a fiduciary or quasi-fiduciary character towards the borrower, or is lending on usurious terms or by way of speculation, or the borrower stands shut off from independent advice? If there is nothing objectionable in an advocate buying land, erecting buildings and letting them out to tenants thereby securing to himself a regular supplementary income, equally there cannot be any objection to an advocate giving loans and deriving an income thereby. To call the former alone an investment and therefore unobjectionable, but not the latter is not warranted by any intelligible consideration. In every case the proper test will be to see whether the transactions serving as a source of supplementary income, whether by way of money-lending or otherwise, amount in fact to the carrying on of a '*business*', in the sense explained *supra*.

RANDIR KARAM SINGH *v.* BHATTACHARJI, I.L.R. 1940 All. 100.

The construction of the term "rights" in S. 1 of the Caste Disabilities Removal Act (XXI of 1850), which declares *inter alia* that so much of any law or usage now in force as inflicts on any person forfeiture of rights or property on change of religion shall cease to be enforced as law, was one of the points dealt with in this case. The question was whether it would be competent to an Indian Christian who prior to conversion had been a Sikh governed by the principles of Hindu law and custom to adopt a son. Answering the question in the negative, the Allahabad High Court has held that the Act preserves only rights to property and not any other class of rights. It is but reasonable that such rights of the apostate as were attributable to and flowed from his adherence to Hinduism should on apostasy be deemed to have been deliberately abandoned by him. Intention to change one's faith must necessarily import with it an intention to forego the rights founded on the doctrines of the original faith and compatible with them only. Acceptance of a new faith involves the acceptance of a system of law consistent with the tenets of the new faith. The rights and obligations incident to the original

status will cease and the Act XXI of 1850 only preserves his rights to property but not his original status, *Adam Haji Peer Muhammad Issac Sait* v. *Kunkam*[1]. Monogamy is an essential part of Christianity and a Hindu convert to that religion cannot possibly take a second wife, while his first wife is alive and the marriage with her remains undissolved. Likewise Christianity does not recognise the right to adopt a son in the sense in which the Hindu law allows it. Hence it will be unavailing to rely on Act XXI of 1850 as preserving to a person the right of adoption which he had as a Hindu, even as it would be unavailing for him to rely on the Act as enabling him to have a plurality of wives. The object of Act XXI of 1850 was really to relieve a person of forfeiture of property rights imposed by the systems of personal laws in this country, on apostasy, so that evangelical enterprise may not labour under any handicap. Thus neither the policy of the Act nor the implications of a change of faith would warrant a larger construction of the term " rights " in S. 1. On apostasy the law of adoption recognised by Hindu law should be taken to have been given up by the convert, *Bai Machhbai* v. *Bai Hirbai*[2]. The Bombay High Court however recognises the possibility of the convert retaining the usage and law in question even in his new status by way of custom[2]. It is questionable how far such a custom can be recognised where its effect will be to enable the apostate to do something which is repugnant to the tenets of his new faith. It is true that conversion will not deprive a convert of his right to give his Hindu son in adoption, *Shamsingh* v. *Shantabai*[3], or of his rights of guardianship over his Hindu children, *see Mahomed* v. *Radhibai*[4], *Dwijapad* v. *Baileau*[5], unless the interests and welfare of the minors would dictate a contrary course, *Skinner* v. *Ords*[6]. The true explanation for the preservation of these rights despite apostasy is that they are not in any wise repugnant to the articles of his new faith and they also sound in property. The protection afforded to the convert by S. 1 of the Act XXI of 1850 is thus available in such cases. The right to adopt a son or to have a plurality of wives stands on an altogether different footing and is therefore outside the scope of such protection.

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1. (1937) 46 L.W. 772.
2. (1911) I.L.R. 35 Bom. 264.
3. (1901) I.L.R. 25 Bom. 551.
4. (1919) 47 I.C. 817.
5. (1916) 20 C.W.N. 608.
6. 14 Moo. I.A. 309.

PANNA LAL *v.* COLLECTOR OF MEERUT, I. L. R. 1940 ALL. 181.

What precisely is the meaning of the expression "as if it were an arrear of land revenue" used in connection with the recovery of dues payable to a Co-operative Society by R. 137 (1) (U.P.) framed under S. 43 of the Co-operative Societies Act, 1912 was one of the points decided in this case. This expression in the same or cognate forms occurs in a number of statutory enactments containing prescriptions for recovery of sums payable to Government or other public bodies. In Madras, some enactments provide that such sums may be recovered "by the *same means* by which arrears of land revenue are recoverable", *see* S. 5 of the Compulsory Labour Act (Madras Act I of 1858). Some other enactments direct their recovery "in the *same manner* as arrears of land revenue", *see* S. 52 of the Revenue Recovery Act (Madras Act II of 1864); S. 2 of the Irrigation Cess Act (Madras Act VIII of 1865); and S. 58 (1) of the Co-operative Societies Act (Madras Act VI of 1932). A number of other statutes prescribe the realisation of any such sum "*as if it were* arrears of land revenue", *see* S. 66 of the Forest Act (Madras Act V of 1882); S. 28 of the Abkari Act (Madras Act I of 1886); S. 89 of the Salt Act (Madras Act IV of 1889); S. 60 of the Court of Wards Act (Madras Act I of 1902); S. 91 of the Local Boards Act (Madras Act XIV of 1920); and S. 70 (2) (ii) (*c*) of the Hindu Religious Endowments Act (Madras Act II of 1927); *Cf.*, also S. 30 of the Indian Income-tax Act (Act II of 1886); S. 7 of the Land Improvement Loans Act (Act XIX of 1883); S. 5 of the Agriculturists Loans Act (Act XII of 1884); S. 194 of the City of Rangoon Municipal Act (Burma Act VI of 1922) etc. A few statutes have directed recovery of the demand "*as an* arrear of land revenue", *see* S. 9 of the Land Encroachment Act (Madras Act III of 1905); S. 6 of the Electricity Duty Act (Madras Act V of 1939); *Cf.*, also S. 44 of the Co-operative Societies Act (Act VI of 1912).

In Madras, the procedure regarding recovery of arrears of public revenue is set out in the Revenue Recovery Act, 1864. S. 42 postulates the effect of a sale of land on account of arrears of revenue under the Act as passing the property free of all antecedent encumbrances thereon to the purchaser. S. 52 prescribes that arrears of revenue other than land revenue, as well as cesses lawfully imposed upon land *etc.*, may be recovered in the same manner as arrears of land revenue under the Act. The question whether S. 42 would stand extended by S. 52 to a sale on account of arrears of abkari revenue, which according to S. 10 of the Madras Abkari Act, 1864 were to be recovered in *like manner* as arrears of land revenue, so as to pass the property free of encumbrances to the purchaser at the revenue sale,

has been answered in the negative, *Ramachandra* v. *Pitchaikanni*[1]. The reason is that land remains security only for public revenue (S. 2), that abkari dues are not included in the definition of public revenue in S. 1 and that a reading of Ss. 3 and 4 suggests that an arrear of revenue under the Act means only an arrear of public revenue. Consequently though recovery of arrears of abkari revenue may be effected in like manner as recovery of arrears of land revenue, still a sale of land on account of the former will not give a preferential title to the purchaser free of encumbrances. In the case, however, of a sale on account of water cess, it has been held that the purchaser would get a free title despite the fact that S. 2 of the Irrigation Cess Act has used language similar to that found in S. 10 of the Abkari Act of 1864, namely, that the cess shall be realised in the same manner as arrears of land revenue, *see* *Vellapayal Ambalam* v. *Karuppiah Pillai*[2], *Dorayya* v. *Ayyanna Charyulu*[3]. This difference in the legal result is based upon the inclusion of water cess within the meaning of the term "public revenue" in S. 1 of the Revenue Recovery Act, which would *proprio vigore* attract S. 42 of that Act to sales held on account of public revenue. It was held that S. 2 of the Irrigation Cess Act regarding recovery of water cess should be deemed to be a superfluity which cannot detract from the legal effect of the sale as set out in the Revenue Recovery Act, *ibid.*

Whether the expression "as if it were an arrear of land revenue" connotes something different from the expression "in like manner as arrears of land revenue", as regards the legal effect of a sale held on account of arrears of particular dues so made recoverable has also been answered in the negative, *Chinnaswami Mudali* v. *Thirumalai Pillai*[4], *Ibrahim Khan Sahib* v. *Rangaswami Naicken*[5]. So wherever a statute directs the recovery of any sum "as if it were an arrear of land revenue," *prima facie* it is only the procedure prescribed by the Revenue Recovery Act that will stand incorporated by reference and a sale held in pursuance of such procedure will not yield to the purchaser a preferential title free of encumbrances, *Chinnaswami Mudali* v. *Thirumalai Pillai*[6], *Kadir Mohideen Marakkayar* v. *Muthukrishna Ayyar*[7], *Lachmi Narain Singh* v. *Nand Kishore Lal Das*[8], *Ibrahim Khan Sahib* v. *Rangaswami Naicken*[9], *Muthusamier* v. *Sree Sreemethanithi Swamiyar*,[10]

1. (1883) I.L.R. 7 Mad. 434.
2. (1911) I.L.R. 37 Mad. 49.
3. (1914) 27 M.L.J. 295.
4. (1901) I.L.R. 25 Mad. 572.
5. (1905) I.L.R. 28 Mad. 420.
6. (1901) I.L.R. 25 Mad. 572 (Land Improvement Loans Act, 1883, S. 7).
7. (1902) I.L.R. 26 Mad. 420 (Income-tax Act, 1886, S. 30).
8. (1902) I.L.R. 29 Cal. 537 (Agriculturists Loans Act, 1884).
9. (1905) I.L.R. 28 Mad. 420 (Abkari Act, 1886, S. 28).
10. (1913) I.L.R. 38 Mad. 356 (Local Boards Act, 1884).

Thammayya v. *Ramanna*[1], *R. M. V. V. M. Chettyar Firm* v. *Subramaniam*[2], *Nagabushanam* v. *Venkanna*[3], *Chinnammal* v. *Saithakkathi*[4]. No doubt it has been sometimes suggested that the phrase "as if it were an arrear of land revenue" if strictly construed, would import that the property is sold free of encumbrances, *see Govindarajulu Naidu* v. *The Secretary of State for India*,[5] and that the term "as if" cannot be said to have reference solely to procedure or to have been intended by the Legislature not to import the operation of S. 42 of the Revenue Recovery Act, *Sankaran Nambudripad* v. *Ramaswami Ayyar*[6]. The weight of authorities indicating a contrary conclusion has however been recognised and followed in these very cases. The decision under review also holds that recovery of any sum in the same manner as an arrear of revenue has reference only to the procedure to be adopted and does not import the substantive right of a purchaser at a sale held on account of arrears of land revenue.

Even the use of the phrase "*as* an arrear of revenue" instead of "*as if it were* an arrear of revenue" in some of the statutory provisions for realisation of sums due either to Government or to a public body may not *per se* point to a different result, inasmuch as the right of the purchaser to get a preferential title free of encumbrances would always depend upon the character of the dues, whether they are such that in law the property sold could have been regarded as a security therefor.

VENKAYYA PANTULU *v.* SURYA PRAKASAMMA, (1940) 2 M.L.J. 328.

One of the points decided in this case was that a successful prosecution for defamation resulting in conviction will be no reason to reduce the amount of damages awardable to the defamed party in a subsequent civil action. It has always been considered that in such cases the pursuit of the civil remedy in addition to the criminal is not incompetent, *Misr Ramji* v. *Jiwan Ram*[7] : *Jodhi Ram* v. *Abdul Mian*[8] ; *Akhil Chandra Biswas* v. *Akhil Chandra Dey*[9] ; *Md. Samiullah Khan* v. *Bishu Nath*[10]. A Bench of the Calcutta High Court has, however, taken the extreme view that where after securing a conviction, a civil suit is subsequently brought for damages in respect of the same injury, the civil Court is not bound as a matter of law to

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1. (1926) 51 M.L.J. 475.
2. (1927) I.L.R. 5 Rang. 458 (City of Rangoon Municipal Act, 1922).
3. (1929) I.L.R. 53 Mad. 151 (Elementary Education Act, 1920).
4. A.I.R. 1935 Mad. 882 (Income-tax Act, 1922, S. 46).
5. (1933) 65 M.L.J. 317.
6. (1918) I.L.R. 41 Mad. 691.
7. (1881) A.W.N. 131.
8. (1893) A.W.N. 63.
9. (1902) 6 C.W.N. 915.
10. A.I.R. 1928 All. 316.

award any damages at all, see *Ooma Churn* v. *Girish Chunder*[1]. Another view is to be gathered from some cases, namely, that if punishment in person, was resorted to, that must always be an important element in mitigation in subsequently estimating the amount of penalty to be inflicted in pocket, *Misr Ramji* v. *Jiwan Ram*[2]; *Ma Sein Tin* v. *U Kyaw Maung*[3]. The decision under review has marked its dissent from these views and it is submitted that there is ample justification for the same. The recognition of criminal and civil responsibility as distinct in character, though one and the same act may be both a wrong and an offence is noticeable from mediaeval times. The civil responsibility is directed towards compensating the injured individual: the criminal liability on the other hand arises because of the disturbance to the peace of the society or the State. The liabilities being distinct, there is no reason why the right of the injured party to damages should be affected by the conviction suffered by the wrong-doer.

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1. (1876) 25 W.R. 22.
2. (1881) A.W.N. 131.
3. A.I.R. 1936 Rang. 332.

MADAN LAL *v.* NAWAB SAYED REZA ALI KHAN (RULER OF RAMPUR STATE), I.L.R. (1940) 1 Cal. 344.

An interesting point and one more or less of first impression relating to the immunity of the Rulers of Indian States from the jurisdiction of British Indian Courts arose for decision in the above case. The question was whether an insolvency petition was maintainable without the previous consent of the Crown Representative under S. 86, Civil Procedure Code, where an applicant's only creditor was a Ruling Chief. In answering the question in the affirmative the learned Judges of the Calcutta High Court have suggested: (1) the immunity of a foreign prince from the jurisdiction of British Courts extends only to his person and *public* property; (2) in India such immunity must be sought within the language of S. 86, Civil Procedure Code, which will not cover cases like the present; (3) in view of the provisions contained in the Provincial Insolvency Act making specific provisions of the Civil Procedure Code applicable to insolvency proceedings it will be doubtful if the rule contained in S. 86 could be extended to such proceedings; and (4) the mere issue of a notice to a creditor under S. 19 (2) of the Provincial Insolvency Act can hardly be described as a legal process. It is submitted that these reasons are not quite valid.

Founded essentially on the principle *par in parem non habet imperium* and partly on the difficulties attendant upon enforcing the judgment of the Courts of one State against a foreign State as well as on considerations of reciprocity the rule has been recognised that a foreign sovereign is immune from the jurisdiction of the municipal courts of a country. According to Dicey the rule is that "no *action* or *other proceeding* can be taken in the courts of this country against a foreign sovereign, nor can the property of a foreign sovereign be seized or arrested."[1] Two propositions of international law seem to be well established and beyond doubt, namely, (1) the courts will not implead either *directly* or *otherwise* a foreign sovereign, *i.e.*, will not by their process make him against his will a party to legal proceedings whether they involve process against his person or seek recovery of specific property or damages, and (2) courts will not by their process, whether the sovereign is a party to the proceedings or not, seize or detain property which is his or of which he is in possession or control.[2] The term 'property' in the context is not limited to ownership but covers also lesser interests, which may not merely be not proprietary

1. Conflict of Laws, 5th edition, p. 194; *see also* Lawrence, Principles of International Law, 7th edition, p. 223 and Chung Chi Cheung *v.* The King, (1939) A.C. 160, 175.

2. Per Lord Atkin in Compania Naviera Vascongado *v.* S. S. Cristina, (1938) A.C. 485, 490.

but not even possessory.[1] Nor is the immunity confined only to property used for the commercial or military purposes of the sovereign. At the present time it seems to extend also to his personal private property.[2] That no distinction can be allowed between the public and private property of a sovereign has been recognised in India also.[3] The rule that a foreign sovereign cannot be impleaded is by no means absolute and possible exceptions are cases of suits to administer a trust fund in Court in which a foreign sovereign is interested,[4] or cases of winding up of banks and companies in the assets of which a foreign sovereign may have an interest.[5] The reason for recognising such exceptions is that otherwise the administering of justice to the other *castuis que trustent* will be frustrated and there is no comity of nations either allowing immunity to foreign sovereigns in such circumstances. Subject therefore to these limitations founded on considerations of expediency, a foreign sovereign is held otherwise immune from the jurisdiction of British courts even in regard to his private property. Save in the case of a cross bill or bill of discovery in aid of a defence and in the case of a sovereign voluntarily coming in to make or resist a claim he cannot be effectually cited. In the words of Lord Langdale, M.R., " even the failure of justice in some particular cases would be less prejudicial than attempts to obtain it by violating immunities thought necessary to the independence of princes and nations."[6]

It is true that in India the immunity of the Ruling Chiefs is defined by S. 86, Civil Procedure Code. The rule being statutory the express provisions thereof are imperative and must be observed and cannot be waived.[7] S. 86 provides that a Ruling Chief may be sued in any competent court with the consent of the Crown Representative but not without such consent. S. 141 of the Code prescribes that the procedure provided in the Code in regard to suits shall be followed as far as it can be made applicable in *all proceedings* in any court of civil jurisdiction. It has been pointed out by the Privy Council that " the proceedings spoken of in S. 647 (S. 141 of Act V of 1908) *include* original matters in the nature of suits such as proceedings

1. Per Lord Wright, in Compania Naviera Vascongado *v.* S. S. Cristina (1938) A.C. 485, 507.

2. Per Lord Atkin in *ibid.*, p. 490; *see also* The Lord Advocate *v.* Lord Dunglas, 9 Cl. and Fin. 211.

3. Elphinstone *v.* Bedreechund, (1830) 1 Knapp. P.C. 316; The Advocate-General of Bombay *v.* Amerchund, 1 Knapp. P.C. 329 f n.

4. Duke of Brunswick *v.* The King of Hanover, (1843) 6 Beav. 1, 39; Lariviere *v.* Morgan, (1872) L.R. 7 Ch.App. 550; Morgan *v.* Lariviere, (1875) 7 H.L. 423.

5. Russian Bank for Foreign Trade, *In re.*, (1933) 1 Ch. 745.

6. Duke of Brunswick *v.* The King of Hanover, (1843) 6 Beav. 1.

7. Gaekwar Baroda State Railway *v.* Hafiz Habib-Ul-Haq, I.L.R. 1938 All. 601 (P.C.).

in probates, guardianships and so forth and do not include executions."[1] The antithesis seems to be between non-execution proceedings and other proceedings. The Calcutta High Court has however added to this dictum the word "only" and laid down that S. 141 extends the procedure of the Code *only* to original proceedings in the nature of suits.[2] A larger view of the scope of S. 141 has been taken in other High Courts.[3] S. 86, Civil Procedure Code, is really a statutory adaptation of the English rule under which no action or *other proceeding* can be brought in a British Court against a foreign sovereign and in *Statham* v. *Statham*,[4] it was held that the principle of S. 86 will apply to proceedings in divorce in which a Ruling Chief is sought to be made co-respondent, though such proceedings are commenced only by a petition and not by a plaint. The expression 'action or other proceeding' though not a term of art is yet familiar as regards its sense. Where a person cannot be heard to protect his interest unless he appears as a party he will be deemed to be a person claiming an interest and as such by the very terms of any notice issuing to him impleaded.[5] A proceeding in insolvency is no doubt initiated by a petition,[6] yet, the latter has to be signed and verified in the manner prescribed in the Civil Procedure Code for signing and verifying plaints[7] and the procedure contained in the Civil Procedure Code with respect to the admission of plaints is to be followed in the case of insolvency petitions.[8] It is thus a proceeding in the nature of a suit and in any event the person affected by the petition being unable to be heard in protection of his rights unless he appears before the Insolvency Court he should be deemed *impleaded* by the notice issuing to him under S. 19 (2) of the Provincial Insolvency Act and thereby brought within the ambit of S. 86, Civil Procedure Code, read with S. 141. The decision in *Official Liquidators, Dehra Dun Mussoorie Electric Tramway Co.* v. *Nabha State*[9] supports this conclusion. It was there held that a proceeding under S. 184 of the Indian Companies Act, 1913, which directs the Court to settle a list of contributories after an order for winding up is not one to which S. 86, Civil Procedure Code, will be attracted, for, by merely settling a list no interest in property of the Ruler is actually affected, whereas where there was any case of an order to be made under S. 186 of the Companies Act for payment of

1. Thakur Parshad *v.* Fakir-ul-lah, (1894) I.L.R. 17 All. 106 (P.C.).
2. Sarat Chandra Bose *v.* Bisweswar Mitra, (1926) I.L.R. 54 Cal. 405.
3. Venkatanarasimha Rao *v.* Suryanarayana, (1925) 50 M.L.J. 75; Venkatarama *v.* Marudachala, A.I.R. 1931 Mad. 798.
4. L.R. 1912 P. 62.
5. Per Lord Atkin in Compania Naviera Vascongado *v.* S. S. Cristina, (1938) A.C. 485, 492.
6. S. 7 of the Provincial Insolvency Act, 1920.
7. S. 12, *ibid.* 8. S. 18, *ibid.*
9. I.L.R. 1938 All. 742.

money due from a person the order can be made by the Court only in cases where a suit to recover the amount would be maintainable, which in the case of a Ruling Chief would automatically bring in the provisions of S. 86, Civil Procedure Code.

The reasoning founded on specific provisions of the Civil Procedure Code being made applicable to proceedings in insolvency by express provisions of the Provincial Insolvency Act[1] as a pointer to the non-applicability by implication of other parts of the Civil Procedure Code is unacceptable. S. 5 of the Provincial Insolvency Act lays down that subject to the provisions of that Act, the Court in regard to proceedings under that Act *shall* follow the same procedure as it follows in the exercise of original civil jurisdiction. The section can only mean that the provisions of the Civil Procedure Code shall govern proceedings in insolvency except where different provisions are to be found in the Insolvency Act itself. There is no warrant for circumscribing the scope of that section by arguing that if by the combined operation of S. 5 of the Insolvency Act and S. 141 of the Civil Procedure Code all the provisions of the Code relating to suits are to be attracted then the provisions of the Insolvency Act making certain specific provisions of the Code applicable to insolvency proceedings would be wholly redundant. Surely the more correct mode of appreciation will be to construe that except as otherwise provided in the Insolvency Act ordinarily all the provisions of the Civil Procedure Code relating to suits will apply to insolvency proceedings and more particularly those provisions of the Code which are in terms made applicable to specific matters by specific sections of the Insolvency Act.

The last of the reasons mentioned in the instant decision, namely, that the issue of a notice to a Ruling Chief under S. 19 (2) of the Insolvency Act can hardly be described as a legal process stands contradicted by the recognition in another part of the judgment that it could be argued that by the issue of such notice " there is an indirect attack upon his personal immunity " and that the necessary result of it where the Ruling Chief is amongst the creditors is " indirectly to subject him to legal process on pain of the debt being extinguished." This will be *a fortiori* where the only creditor is a Ruling Prince. It is submitted that the correct view would be to hold that in such a case the previous consent of the Crown Representative will be necessary to the maintainability of the debtor's petition for adjudication.

[END OF VOLUME 1940—II.]

1. *See* Ss. 2 (2), 12, 13, 18, 20, 21, 28, 60, 75 etc. of the Provincial Insolvency Act, 1920.